Supreme Court, U.S.
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No. 05-____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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HENRY TORROMEO and MDR CORPORATION,
*Petitioners*,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
*Respondent.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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# PETITION FOR A WRIT OF CERTIORARI

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July 21, 2006

## QUESTIONS PRESENTED

In *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), four concurring Justices stated this Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), "may have been mistaken," because "[i]t is not clear ... that *Williamson County* was correct in demanding that ... the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 545 U.S. at 340.

1. **Must a takings claimant first seek and be denied compensation in state court, before bringing a federal takings claim in federal court?**

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005), this Court held that the "failure to substantially advance a legitimate government interest" formula from *Agins v. City of Tiburon,* 447 U.S. 255 (1980), "has no proper place in our takings jurisprudence" because it "prescribes an inquiry in the nature of a due process ... test ...." *Lingle,* 544 U.S. at 540. The lower federal courts are widely split over the standard of liability for a deprivation of property without due process.

2. **What is the proper standard of liability for a deprivation of property without due process?**

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are Henry Torromeo, a sole proprietor, and MDR Corporation, a small family-owned business incorporated in the State of New Hampshire and run by brothers Mark and Daniel Post and their father Russell Post. Torromeo and MDR are in the business of developing and building single-family home sites. MDR has no parent or subsidiary corporation, and no public company owns more than ten percent of its stock.

The Respondent is the Town of Fremont, a municipal corporation in the southeast corner of New Hampshire.

## TABLE OF CONTENTS

Page(s)

Questions Presented ..... i

Parties to the Proceeding ..... ii

Rule 29.6 Statement ..... ii

Table of Authorities ..... v

Table of Appendices ..... xii

Opinions Below ..... 1

Jurisdiction ..... 1

Constitutional Provisions ..... 1

Statement of the Case ..... 1

A. Fremont Denies Petitioners' Right to Build ..... 2

B. Petitioners' State Actions Seeking Compensation ..... 3

C. District Court Dismisses Federal Claims ..... 5

D. Court of Appeals Affirms ..... 6

Reasons for Granting the Writ ..... 7

I. *WILLIAMSON*'S STATE-LITIGATION RULE HAS GENERATED CONFLICTS AND CONFUSION, AND SHOULD BE RECONSIDERED ..... 7

A. The State-Litigation Rule and the "*Williamson* Trap" ..... 7

B. *San Remo* ..... 9

C. This Court's Decisions Conflict ..... 12

1. *Williamson* and *San Remo* ..... 12

2. Removal Jurisdiction ..... 14

3. Seventh Amendment Rights to Jury Trials ..... 15

D. The Circuit Courts of Appeals Conflict ..... 15

1. Conflict on Claim Preclusion ..... 15

2. Conflict on Removed Cases ..... 17

3. Conflict on Application of State-Litigation Rule to Other Constitutional Claims ..... 18

E. This Appeal Turns on the State-Litigation Rule, not Claim Preclusion ..... 19

F. Because of the State-Litigation Rule, the Takings Clause is the Only Bill of Rights Provision Barred From Federal Court Review ... 20

G. Thus, *Williamson* Demands Reconsideration ..... 23

II. THIS COURT SHOULD RESOLVE THE SPLINTERED CIRCUIT STANDARDS ON LIABILITY FOR DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS ..... 24

A. This Court's Decisions Regarding Deprivation of Property Without Due Process ..... 24

B. The Lower Courts are Applying Different and Conflicting Due Process Standards To Deprivations Of Property ..... 25

1. "Rational Relationship" ..... 26

2. "Shocks The Conscience" ..... 27

3. Hybrid Approach ..... 27

4. "Arbitrary and Capricious" ..... 28

III. CONCLUSION ..... 28

## TABLE OF AUTHORITIES

### FEDERAL CASES

Page(s)

*Agins v. City of Tiburon*, 447 U.S. 255 (1980) ..... 24

*Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999) ..... 8

*Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996) ..... 8, 18

*Bauknight v. Monroe County*, 446 F.3d 1327 (11th Cir. 2006) ..... 10

*Bowers v. City of Flint*, 325 F.3d 758 (6th Cir. 2003) ..... 28

*Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) ..... 15

*City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997) ..... 14

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) ..... 3-4, 15

*Clinton v. City of New York*, 524 U.S. 417 (1998) ..... 28

*Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337 (5th Cir. 2001) ..... 27

*County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159 (3d Cir. 2006) ..... 8, 18, 28

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ..... 27

*Crider v. Board of County Comm'rs of the County of Boulder*, 246 F.3d 1285 (10th Cir. 2001) ..... 26

*Deniz v. Mun. of Guaynabo*, 285 F.3d 142 (1st Cir. 2002) ..... 18

*DLX, Inc. v. Kentucky*, 381 F.3d 511 (2004) ..... 16

*Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) ..... 16

*Dolan v. City of Tigard*, 512 U.S. 374 (1994) ..... 29

*Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83 (2d Cir. 2002) ..... 18

*Eastern Enterps. v. Apfel*, 524 U.S. 498 (1998) ..... 24

*England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964) ..... 10

*Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) ..... 6

*Felder v. Casey*, 487 U.S. 131 (1988) ..... 23

*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) ..... 4, 23

*Forseth v. Vill. of Sussex*, 199 F.3d 363 (7th Cir. 2000) ..... 8, 18

*Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) ..... 18

*Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) ..... 4, 8, 13, 19

*Greater Chicago Combine and Ctr., Inc. v. City of Chicago*, 431 F.3d 1065 (7th Cir. 2005) ..... 26

*Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494 (2d Cir. 2001) ..... 28

*Int'l College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998) ..... 17

*Iowa Coal Mining Co., Inc. v. Monroe County*, 257 F.3d 846 (8th Cir. 2001) ..... 26

*Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006) ..... 17, 27

*Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003) ..... 11

*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) ..... 24, 26

*McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997) ..... 18

*Mills v. Rogers*, 457 U.S. 291 (1982) ..... 21

*Mitchum v. Foster*, 407 U.S. 225 (1972) ..... 23

*Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003) ..... 20

*Nicholas v. Penn. State Univ.*, 227 F.3d 13326 (3d Cir. 2000) ..... 28

*Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir.), *cert. denied*, 540 U.S. 1090 (2003) ..... 19

*Patsy v. Fla. Bd. of Regents*, 457 U.S. 496 (1982) ..... 23

*Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989) ..... 16

*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) ..... 22

*Peters v. Fair*, 427 F.3d 1035 (6th Cir. 2005) ..... 8

*PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) ..... 21

*Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998 (W.D. Tenn.), *aff'd*, 178 F.3d 1295 (6th Cir. 1999) ..... 16

*Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991) ..... 8

*San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) ..... *passim*

*San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005) ..... 10

*Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623 (5th Cir. 2003) ..... 17

*Santana v. City of Tulsa*, 359 F.3d 1241 (10th Cir. 2004) ..... 27

*Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003) ..... 16

*Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) ..... 18

*Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998) ..... 8

*S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584 (4th Cir. 2002) ..... 26

*Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) ..... 8

*Spoklie v. Montana*, 411 F.3d 1051 (9th Cir. 2005) ..... 26

*Suitum v. Tahoe Reg'l Planning Agency*,
520 U.S. 725 (1997) ..... 20

*Sutton v. United Air Lines, Inc.*,
527 U.S. 471 (1999) ..... 25

*SWF Arecibo Ltd. v. Rodriguez*, 415 F.3d 135
(1st Cir. 2005) ..... 25

*Tahoe-Sierra Pres. Council v. Tahoe Reg'l*
*Planning Agency*, 535 U.S. 302 (2002)..... 17

*The Travelers Indem. Co. v. Dingwell*,
884 F.2d 629 (1st Cir. 1989) ..... 20

*Village of Euclid v. Ambler Realty Co.*,
272 U.S. 365 (1926) ..... 26

*Von Kerssenbrock-Praschma v. Saunders*,
121 F.3d 373 (8th Cir. 1997)..... 8

*Warren v. City of Athens*, 411 F.3d 697
(6th Cir. 2005) ..... 28

*Wilkinson v. Pitkin County Bd. of County*
*Comm'rs*, 142 F.3d 1319
(10th Cir. 1998) ..... 11-12, 16

*Williamson County Reg'l Planning Comm'n v.*
*Hamilton Bank of Johnson City*,
473 U.S. 172 (1985) ..... *passim*

**STATE CASES**

*Blue Jay Realty Trust v. City of Franklin*,
567 A.2d 188 (N.H. 1989)..... 4, 8, 9, 13

*Breneric Assocs. v. City of Del Mar*, 69 Cal. App.
4th 166, 81 Cal. Rptr. 2d 324 (1998) ..... 8

*Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981) ..... 6, 13

*Goldberg Cos., Inc. v. Richmond Heights City Council*, 690 N.E.2d 510 (Ohio 1998) ..... 22

*Melillo v. City of New Haven*, 732 A.2d 133 (Conn. 1999) ..... 8

*San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002) ..... 10

*Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001) ..... 6

*Santini v. Conn. Hazardous Waste Mgmt. Service*, 739 A.2d 680 (Conn. 1999), *cert. denied*, 530 U.S. 1225 (2000) ..... 22

*State v. Ball*, 471 A.2d 347 (N.H. 1983) ..... 6, 21

**Constitutional Provisions and Statutes**

U.S. Const. amend. V ..... 1

U.S. Const. amend. XIV ..... 1

28 U.S.C. §1254(1) ..... 1

28 U.S.C. §1441(a) ..... 14

42 U.S.C. §1983 ..... 22

N.H. Const., First Part, Art. 12 ..... 4

**Miscellaneous**

Michael Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at*

*Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004) ..... 9

John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Plaintiffs can Enter the Federal Courthouse*, 31 Urb. Law. 195 (1999) ..... 21

Steven J. Eagle, Regulatory Takings (2d ed. 2001) .... 12

Robert H. Freilich & Jason M. Divelbiss, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371 (1999) ..... 9

Test. of Prof. Daniel Mandelker on H.R. 1534, Before the H. Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property, *reprinted in* 31 Urb. Law. 195 (1999) ..... 21

Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000) ..... 9, 12

Restatement (Second) of Judgments § 26(1)(c) (1982) ..... 19

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) ..... 12

Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523 (1995) ..... 22

## TABLE OF APPENDICES

A. Decision, *Torromeo, et al. v. Town of Fremont*, No. 04-2547 (1st Cir. Feb. 21, 2006) ..... App. 1a

B. Office of the Clerk, U.S. Supreme Court, *Letter Granting Application for Extension of Time to File Petition for Certiorari to July 21, 2006* (dated June 28, 2006) ..... App. 12a

C. Order Denying Petition for Rehearing and Suggestion for Rehearing *en banc*, *Torromeo, et al. v. Town of Fremont,* Civil No. 04-2547 (1st Cir. Apr. 11, 2006) ..... App 14a

D. Order, *Torromeo, et al. v. Town of Fremont*, Civil No. 03-481-SM, Opinion No. 2004 DNH 148 (D. N.H. Oct. 12, 2004) ..... App. 15a

E. Complaint for Deprivation of Civil Rights Under 42 U.S.C. § 1983, *Torromeo, et al. v. Town of Fremont,* Civil No. 03-481-SM (D. N.H.) filed Nov. 5, 2003 ..... App. 29a

F. Excerpt From Respondent's Brief in Opposition, to Petition for Writ of Certiorari, *Torromeo, et al. v. Town of Fremont,* No. 02-1507 May 9, 2003 ..... App. 40a

G. December 13, 2002 Opinion of New Hampshire Supreme Court, Denying Takings Liability ..... App. 43a

H. September 26, 2001 Town of Fremont's Notice of Appeal to New Hampshire Supreme Court ..... App. 50a

I. September 26, 2001 Order of Rockingham Superior Court, Awarding Damages to Petitioners ..... App. 58a

Page

## TABLE OF APPENDICES
**(continued)**

J. March 19, 2001 Order of Rockingham Superior Court, on Motion for Reconsideration ..... App. 69a

K. June 26, 2000 Summary Affirmance of New Hampshire Supreme Court ..... App. 74a

L. Writ of Summons and Attachment, *MDR Corporation v. Town of Fremont* [inverse condemnation action], March 21, 2000 ..... App. 75a

M. Writ of Summons and Attachment, *Torromeo v. Town of Fremont*, [inverse condemnation action], March 21, 2000 ..... App. 79a

N. January 31, 2000 Order of Rockingham Superior Court, Regarding Torromeo Industries' Vested Lots ..... App. 84a

O. December 27, 1999 Order of Rockingham Superior Court, Declaring Growth Control Ordinance "Invalid Ab Initio"..... App. 91a

P. New Hampshire Constitution, First Part, Article 12 ..... App. 95a

## PETITION FOR A WRIT OF CERTIORARI

Henry Torromeo and MDR Corporation ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 438 F.3d 113 (1st Cir. 2006). The opinion of the district court, App. 15a, is unpublished.

## JURISDICTION

The court of appeals issued its decision on February 21, 2006, and denied rehearing on April 11, 2006. App. 14a. Justice Souter extended the time to file this petition to and including July 21, 2006. App. 12a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment's Due Process and Takings Clauses provide: "No person shall ... be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. They are applicable to the States through the Fourteenth Amendment, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

## STATEMENT OF THE CASE

The law regarding ripeness under the Fifth Amendment Takings Clause is conflicting and confusing. This petition seeks clarification of the procedures that a plaintiff must pursue so that a federal court can resolve the merits of a federal takings claim.

*Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), held that a Fifth Amendment takings claim is not ripe for adjudication "until" the claimant has pursued available

"state procedures" and has been denied compensation. Lower federal and state courts have interpreted this holding to mean that a federal takings claim does not exist until state litigation has been exhausted. Last term, in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 342 (2005), four concurring Justices agreed that *Williamson*'s "state-litigation rule" has "created some real anomalies, justifying our revisiting the issue." The concurrence stated "our decision in *Williamson* ... may have been mistaken," because "[it] is not clear ... that *Williamson* ... was correct in demanding that ... [a takings] claimant must seek compensation in state court before bringing a federal takings claim in federal court." *Id.* at 340.

This petition squarely presents the opportunity to "revisit" the "real anomalies" created by *Williamson*. The lower federal and state courts have thoroughly considered and addressed the state-litigation rule. Postponing review will not contribute to resolution of the questions presented. More turmoil on the procedures to ripen Fifth Amendment takings claims will spread unless this Court intervenes.

A. Fremont Denies Petitioners' Rights to Build.

Petitioners are typical of takings claimants who have been trapped by *Williamson*'s jurisdictional requirements. Their litigation odyssey exceeds six years at this point, and they have yet to receive a decision on the merits of their federal takings claims from *any* court.

In early 1999, Petitioner Henry "Red" Torromeo owned five lots in a 27-lot, partially-built residential subdivision in Fremont, New Hampshire. Torromeo had rights, conferred by state statute, to a building permit for each of his five vacant lots. Also in early 1999, Petitioner MDR Corporation, a small, family-run home building business, had a plan to develop 14 lots in a different subdivision on land zoned to allow that use.

In March 1999, Fremont adopted an ordinance establishing an annual cap on the number of building

permits it would issue. In April 1999, the town's planning board set a limit of 26 permits to be issued during the next 12 months.

MDR requested 14 building permits in May 1999. Applying the cap, the town issued five, denied the rest, and informed MDR it would have to wait until at least April 2000 to receive any more permits. MDR then sued in state court to compel permit issuance. In September 1999, Torromeo requested building permits for his five lots, but the town denied them all because the annual quota had been reached. Torromeo then brought his own state lawsuit to compel permit issuance.

In December 1999, in MDR's case, a state trial court declared the building cap ordinance "invalid *ab initio*" because the town failed to comply with the statutory requirements to adopt such an ordinance. App. 94a. The court thus ordered Fremont to issue MDR's remaining permits. Fremont was also ordered to issue Torromeo's permits because a state statute gave him the right to build, as the subdivision in which his lots were located pre-dated the ordinance's enactment. App. 88a. The town only appealed the MDR decision, and the New Hampshire Supreme Court affirmed that the ordinance was invalid. App. 74a.

B. Petitioners' State Actions Seeking Compensation.

By enforcing the invalid ordinance and denying building permits, the town froze substantial investments that MDR and Torromeo made in their properties. Thus, in separate suits, Petitioners brought state law claims against Fremont for inverse condemnation without just compensation.[1] App. 75a, 79a. Adhering to First Circuit

[1] Inverse condemnation occurs when the "government [defendant] takes the land at issue without initiating condemnation proceedings," such as by regulation or physical occupation. *City of*

and New Hampshire precedent interpreting *Williamson* to mean that a federal takings claim does not exist until compensation is denied under state law, Petitioners sued in state court under the New Hampshire Constitution's takings provision. App. 95a. See *Gilbert v. City of Cambridge*, 932 F.2d 51, 64 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991); *Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989) (both holding that a Fifth Amendment claim is not ripe until a state claim has been denied). To support their state compensation claims, MDR's and Torromeo's complaints each referred once to the federal Takings Clause. They also cited one federal decision, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-316 (1987) (holding that the Fifth Amendment's "self-executing" remedy for a taking is the payment of just compensation, not simply invalidation of the underlying government action). App. 77a-78a; 81a-82a.

The cases were consolidated. In March 2001, a state trial court ruled, solely on state law grounds, that Fremont's conduct was "unconscionable" and that Petitioners were "entitled as a matter of law to recover damages for economic loss due to Fremont's attempted enforcement of its invalid Growth Control Ordinance." App. 72a. The court subsequently awarded $71,600 to MDR and $23,800 to Torromeo. App. 67a.

Fremont appealed, *identifying only state law as the basis*. App. 50a-57a. The New Hampshire Supreme Court reversed. App. 43a-49a. It held that Fremont's denial of the building permits was "an erroneous planning board decision based upon an otherwise valid regulation" (App. 47a), and that just compensation for a taking is due only when a court "determin[es] that the ordinance is unconstitutional." App. 48a. New Hampshire law

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*Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712 (1999).

provided the sole basis for the state supreme court's decision. It did not reference a single federal case. Nor did it address whether its analysis satisfied Fifth Amendment standards.

Petitioners sought a writ of certiorari from this Court, docketed as No. 02-1507. That petition challenged the New Hampshire Supreme Court's decision as contradicting federal takings standards, including those established by *First English*. In opposition, Fremont argued that Petitioners had waived any federal takings claim by failing to plead or argue the Fifth Amendment in the state inverse condemnation action. App. 42a. This Court declined review, 539 U.S. 923 (2003).

C. District Court Dismisses Federal Claims.

Having satisfied *Williamson*'s requirement to ripen their federal takings claims by first seeking and being denied compensation in the New Hampshire courts, Petitioners brought this action in U.S. district court in August 2003. App. 29a. Their federal complaint, filed under 42 U.S.C. § 1983, sought compensation under the Fifth Amendment Takings Clause. App. 36a-37a. Petitioners also alleged that Fremont's actions deprived them due process and equal protection under the Fifth and Fourteenth Amendments. App. 37a-38a. Fremont moved to dismiss, asserting the *Rooker-Feldman* doctrine and claim preclusion. It did not assert issue preclusion.[2] The district court held that claim preclusion and *Rooker-Feldman* barred all claims. App. 15a.

[2] Claim preclusion, or res judicata, bars re-litigation of claims in a subsequent suit that were or could have been raised in a prior action. Issue preclusion, or collateral estoppel, prevents subsequent re-litigation of identical issues of fact or law that were actually decided by and essential to a prior judgment. *San Remo*, 545 U.S. at 332 n.16 (comparing the two doctrines).

D. Court of Appeals Affirms.

While this appeal was pending, the Court decided *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), which the court of appeals thought "substantially limited the reach" of Fremont's *Rooker-Feldman* defense. App. 4a. The issue on appeal thus narrowed to whether claim preclusion barred Petitioners' federal claims.

Petitioners argued that, under First Circuit and New Hampshire interpretations of *Williamson,* their federal takings claims did not ripen and did not exist until after the New Hampshire courts denied compensation. Thus, claim preclusion could not bar Petitioners' federal takings claims because they were not cognizable until the state court proceedings were exhausted. Petitioners further argued that even if they tried to assert Fifth Amendment takings claims in the state action, any federal claims would not have been decided because New Hampshire courts employ a "primacy approach" to constitutional cases. Using this approach, New Hampshire courts do not reach federal constitutional claims unless they determine that federal law provides greater protection than state law. See, *e.g.*, *State v. Ball*, 471 A.2d 347 (N.H. 1983). Because New Hampshire regards the state and federal takings clauses as equivalent, its courts decide takings claims on state constitutional grounds only. See, *e.g.*, *Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001); *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981).

Nonetheless, the court of appeals found that claim preclusion barred federal adjudication of Petitioners' federal takings claims. It thought that "this case appears to fall squarely within New Hampshire's res judicata rules." App. 5a. It thus invoked claim preclusion because Petitioners' state complaints "identified the Takings Clause of the Fifth Amendment" and "cited *First English* ..., a Supreme Court case interpreting the Takings Clause." App. 7a. It further reasoned that because New Hampshire regards the state and federal takings clauses as equivalent, "the [state] court's decision that the Town did not violate

the [state] takings provision ... means, *a fortiori,* that, in its view, there was no unlawful taking under federal law." App. 8a, n. 3.

As to Petitioners' due process and equal protection claims, the court of appeals bypassed ripeness and claim preclusion and disposed of them on the merits. It held that "substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest." App. 9a-10a. The court held that the town's enforcement of the invalid ordinance and withholding of Petitioners' permits, to which they were entitled under state law, did not meet this standard. The court of appeals thus ignored the state trial court's finding that Fremont's conduct was "unconscionable." App. 72a. As to equal protection, the court framed the standard as "extreme circumstances" or "fundamental discrimination," and concluded the facts did not rise to that level. App. 11a. It later denied rehearing. App. 14a.

## REASONS FOR GRANTING THE WRIT

### I. *WILLIAMSON*'S STATE-LITIGATION RULE HAS GENERATED CONFLICTS AND CONFUSION, AND SHOULD BE RECONSIDERED.

#### A. The State-Litigation Rule and the *"Williamson* Trap."

*Williamson* devised two rules to ripen Fifth Amendment takings claims. First, such claims are not ripe until government "has reached a final decision regarding application of the regulations to the property ..." 473 U.S. at 186. This finality rule is not at issue here.

*Williamson*'s second ripeness requirement is at issue: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo,* the late Chief Justice

Rehnquist labeled this requirement the "state-litigation rule," and described it as follows: "Until the claimant had received a final decision of compensation through all available state procedures, such as by an inverse condemnation action, ... he 'could not claim a violation of the Just Compensation Clause.'" 545 U.S. at 341 (citing *Williamson,* 473 U.S. at 195-196). The concurrence further observed that the state-litigation rule "may have been mistaken." *Id.* at 340.

Most federal circuits (including the First Circuit) have interpreted *Williamson* to mean that a Fifth Amendment takings claim is not ripe—it does not exist—until a property owner has litigated its case in state court, under state law, and has been denied compensation.[3] In addition, several state courts (including New Hampshire's) have held that a federal takings claim may *not* be joined with a state takings claim. See, *e.g.*, *Melillo v. City of New Haven*, 732 A.2d. 133 (Conn. 1999); *Breneric Assocs. v. City of Del Mar,* 69 Cal. App. 4th 166, 81 Cal. Rptr. 2d 324 (1998); *Blue Jay Realty Trust v. City of Franklin,* 567 A.2d 188 (N.H. 1989). However, after takings claimants pursue initial state litigation as *Williamson* requires, federal courts still avoid the merits of Fifth Amendment claims by

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[3] *Gilbert v. City of Cambridge,* 932 F.2d 51, 63-65 (1st Cir.), *cert. denied,* 502 U.S. 866 (1991); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 168 (3rd Cir. 2006); *Samaad v. City of Dallas,* 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368-73 (7th Cir. 2000); *Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 379-80 (8th Cir. 1997); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied,* 523 U.S. 1059 (1998); *Bateman v. City of West Bountiful*, 89 F.3d 704, 708-709 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

dismissing them on claim preclusion, issue preclusion, *Rooker-Feldman*, abstention, or a combination of these grounds. See generally Michael Berger & Gideon Kanner, *Shell Game! You Can't get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004).

Thus, it has become the regular practice of the lower courts to bar federal takings claims brought before state court litigation as *too early*, and federal claims brought after state litigation as *too late*. This problem is called the "*Williamson* Trap,"[4] and it has ensnared Torromeo and MDR. Under *Williamson*, First Circuit precedent, and the weight of numerous other cases, Petitioners did not have ripe federal takings claims when they filed their state court actions for compensation. And, under New Hampshire case law, they were unable to raise Fifth Amendment claims in the state action. *Blue Jay Realty*, 567 A.2d at 192. Yet, after Petitioners exhausted litigation in the state courts to ripen their federal claims, the court of appeals below invoked claim preclusion to bar federal adjudication. In other words, the New Hampshire litigation, "far from 'ripening' the federal cause of action, ... has instead extinguished it .... Thus, ... the very act of 'ripening' [Petitioners' federal] case also end[ed] it."[5]

B. *San Remo*.

The *Williamson* Trap laid the foundation for *San Remo*. The state-litigation rule's validity was not directly challenged in *San Remo*, as it is in this petition. Rather, the question there was whether the rule's application warranted an exemption. The Court was asked to decide "whether

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[4] Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000).

[5] See Robert H. Freilich & Jason M. Divelbiss, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 (1999).

federal courts may craft an exception to the full faith and credit statute for claims brought under the Takings Clause of the Fifth Amendment." 545 U.S. at 326.[6] *San Remo* also addressed whether a claimant could avoid issue preclusion by reserving a federal claim in state court under the authority of *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964). *San Remo*, 545 U.S. at 333-34.

This Court held it was "not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum" after initial state litigation mandated by *Williamson*. *San Remo*, 545 U.S. at 339. The Court further recognized that issue preclusion bars relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* at 336. "This is so even when the plaintiff would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* Moreover, the Court ruled that reserving a federal claim for later federal court review was not permissible, resolving a circuit split on this point. *Id.* at 333-34.[7]

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[6] In *San Remo*, the plaintiffs challenged a monetary exaction to mitigate a claimed impact on San Francisco's affordable housing stock resulting from the conversion of a residential building to a tourist hotel. The California courts, adjudicating a state law claim only, with plaintiff's federal claim expressly reserved, considered whether the exaction was a taking without compensation, and held it was not. *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002). The hotel owners then proceeded to federal court. The Ninth Circuit estopped the federal action under issue preclusion, finding that the state court actually and necessarily decided the principal issues comprising the federal claim. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004), *aff'd*, 545 U.S. 323 (2005).

[7] Yet, the Eleventh Circuit, without mentioning *San Remo*, recently held that a federal claim may still be reserved. *Bauknight v. Monroe County*, 446 F.3d 1327, 1330-31 (11th Cir. 2006).

*San Remo* disrupted the entrenched interpretation of *Williamson* (see *supra* note 3), that a federal takings claim is not ripe until state proceedings have terminated. Holding that state courts *may* exercise jurisdiction over state *and* federal claims in the mandated state action, *San Remo* explained:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

*Id.* at 338 (citing *Williamson,* 473 U.S. at 194) (emphasis supplied).

*San Remo*'s relinquishment of federal jurisdiction over Fifth Amendment claims prompted four concurring Justices to question the state-litigation rule. It was not clear to them that *Williamson* "was correct in demanding that once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo,* 545 U.S. at 340 (Rehnquist, C.J., concurring). The concurrence doubted that "either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." *Id.* at 340-41. The concurrence further acknowledged that the "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 342.[8] These anomalies

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[8] Several lower courts would agree. See, *e.g.*, *Kottschade v. City of Rochester,* 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied,* 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs,* 142 F.3d 1319, 1325 n.4 (10th Cir.

include contradictions within this Court's own body of takings law, and conflicts between the circuit courts of appeals.

C. This Court's Decisions Conflict.

1. *Williamson* and *San Remo*. Tension is especially pronounced between *Williamson* and *San Remo*. The *Williamson* Court made clear that exhaustion of state compensation procedures is a necessary first step to ripen federal takings claims: "*until* [a plaintiff] has utilized [state] procedure[s], its takings claim is *premature*." *Williamson*, 473 U.S. at 197. (emphasis supplied).[9] Numerous lower federal courts have interpreted *Williamson* to mean that a federal takings claim becomes justiciable only after state litigation is over and compensation is denied to the plaintiff. *Supra* note 3. Scholars also read *Williamson* as allowing federal adjudication after a state court denies compensation.[10]

The full Court's opinion in *San Remo*, however, upended this widespread understanding. It declared that

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1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

[9] See *also Williamson*, 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so"); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available State] procedure and been denied just compensation").

[10] See, *e.g.*, Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

takings plaintiffs could "simultaneously" request compensation in state court under both state and federal law, and that Fifth Amendment claims could be brought during a state suit. *San Remo,* 545 U.S. at 338. Thus, while *Williamson* ruled that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* ruled that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? How can a Fifth Amendment claim be brought simultaneously with a state claim in state court, when that federal claim is not ripe until after the state court denies compensation? Must the federal and state takings claims be raised in the same, or separate, state suits? Should those claims be tried in state court sequentially? If sequential, do claim and issue preclusion apply to the federal claim if compensation is denied under state law? What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, *supra* note 3, which have been virtually unanimous that, under *Williamson,* they lack federal takings jurisdiction until state litigation concludes? This question is critical to Petitioners because, when they filed their state suit, First Circuit precedent deemed their federal takings claim unripe. See *Gilbert v. City of Cambridge,* 932 F.2d 51, 63-65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991). Did *San Remo*'s allowance of "simultaneous claims" overrule cases like *Gilbert*?

And what happens to state court decisions like *Blue Jay Realty,* 567 A.2d 188, which refuse to entertain federal takings claims until compensation is finally denied under state law? How could Petitioners ever bring Fifth Amendment claims in the New Hampshire system, where takings litigation is resolved "solely on the basis" of the state's constitution? See *Burrows v. Keene,* 432 A.2d 15 (N.H. 1981). As the *San Remo* concurrence acknowledged:

> [I]n some states the courts themselves apply the state litigation requirement from *Williamson* ... refusing to entertain any federal takings claim until the claimant receives a final denial of compensation through all

> available state procedures ... [Citations omitted.] This precludes litigants from asserting their federal claim even in state court.

*San Remo*, 545 U.S. at 342, n.2 (Rehnquist, C.J., concurring).

If federal takings claims are to be decided exclusively by state courts, with no further access to federal court, then this Court should clearly state that is the case. If the predominant interpretation of *Williamson*—that a federal claim is not ripe until compensation has been denied in state litigation—has been overruled, claimants and courts require this clarification. If issue and claim preclusion bar litigation of a federal claim in state court *and* access to federal court after state proceedings, this Court should so declare. Respectfully, this petition should be granted so the Court can clarify the contradictions between *Williamson* and *San Remo*.

2. Removal Jurisdiction. *Williamson's* state-litigation rule also cannot be reconciled with *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 163. Under the federal removal statute, a case can be removed from state to federal court only if it could have been brought in federal court *originally*. 28 U.S.C. §1441(a).

Under *Williamson*, federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. *San Remo* confirms there is no original federal jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state claims in state court. Yet under *City of Chicago*, federal courts *do* have original jurisdiction over federal takings claims because a municipality may remove them to federal court. The upshot is that the lower federal courts decide federal

takings claims only when municipal defendants exercise their removal option. The petition should be granted to address the dilemma created by *Williamson, San Remo,* and *City of Chicago,* as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

3. Seventh Amendment Rights to Jury Trials. *Williamson's* state-litigation rule also undermines *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). There, this Court held that takings plaintiffs in section 1983 litigation, like Petitioners here, have a Seventh Amendment right to a jury trial on issues of government liability. In stark contrast, state courts generally do not submit regulatory takings liability issues to juries. *Id.* at 719. Indeed, Petitioners never received a jury trial on Fremont's Fifth Amendment liability in the New Hampshire courts. If *Williamson* and *San Remo* truly compel litigation of federal takings claims in state court, then the Seventh Amendment rights confirmed by *Del Monte Dunes* are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights applied to the states through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes,* 526 U.S. at 719. This Court's attention is needed to ensure that the state-litigation rule does not abrogate Seventh Amendment rights to jury trials in takings cases.

D. The Circuit Courts of Appeals Conflict.

1. Conflict on Claim Preclusion. In this case, the court of appeals invoked claim preclusion to dismiss Petitioners' takings claims. It thus widened a multi-circuit split, which developed prior to *San Remo*, on whether claim preclusion applies in a subsequent federal takings suit that follows a *Williamson*-mandated state action. Here, the First Circuit joined the Third, Sixth, and Tenth Circuits in allowing

claim preclusion to bar subsequent federal takings claims following mandatory state proceedings.[11] The Second and Ninth Circuits, and the Sixth Circuit in a later case, have disagreed. They have held that compulsory resort to state court under *Williamson* does not extinguish Fifth Amendment claims subsequently filed in federal court.[12] As the Sixth Circuit observed in rejecting a claim preclusion defense: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004).

Significantly, the Ninth Circuit has distinguished between issue and claim preclusion in the context of the state-litigation rule. In *San Remo,* the Ninth Circuit invoked *issue* preclusion to bar relitigation in subsequent federal proceedings. 364 F.3d 1088, 1096 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005). But in *Dodd,* the Ninth Circuit refused to apply *claim* preclusion:

> [To] hold that a takings plaintiff must first present a Fifth Amendment claim to the state court system ... would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.

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[11] See *Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998 (W.D. Tenn.), *aff'd*, 178 F.3d 1295 (6th Cir. 1999).

[12] See *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), overruled as to issue preclusion and claim reservation by *San Remo*, 545 U.S. at 336; *DLX, Inc. v. Kentucky*, 381 F.3d 511 (2004); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

59 F.3d at 869-70. The circuits thus disagree on the application of claim preclusion following *Williamson* state proceedings, and this Court should intervene.

2. Conflict on Removed Cases. As discussed *supra* 14-15, *City of Chicago* allows a municipal defendant to remove a takings case to federal court after a plaintiff's initial state filing. However, the lower courts are split on whether they have jurisdiction to decide Fifth Amendment takings claims that have been so removed. The Seventh Circuit, on remand in *City of Chicago,* decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago,* 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit recently held it lacked jurisdiction precisely because no original state proceeding had ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court by the city's removal motion. *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court—and then argue for dismissal because *Williamson's* state-litigation rule went unsatisfied. The Fifth Circuit rewarded the city for its chutzpah by dismissing the case. See *Sandy Creek Investors, Ltd. v. City of Jonestown,* 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" are at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 333 (2002). It is not fair or just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. The circuits are split on how to handle removed takings cases. The Court could resolve this conflict by addressing the state-litigation rule as presented in this petition.

3. Conflict on Application of State-Litigation Rule to Other Constitutional Claims. The lower federal courts also clash on whether the state-litigation rule extends beyond takings claims to reach due process and equal protection claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. Indeed, Petitioners here asserted all three claims against Fremont. Some circuits restrict *Williamson*'s state remedies requirement to takings claims only.[13] However, the Seventh Circuit, in parsing a landowner's section 1983 claims, held that *Williamson*'s state-litigation rule applies to takings and due process, but not equal protection. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). The First Circuit has held that state claims must be exhausted to ripen federal takings and due process claims, without opining on equal protection. *Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002). The Second and Tenth Circuit extended *Williamson* to its outer limits, requiring ripening state litigation for all three types of claims. *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

This issue is particularly important because of *San Remo*'s authorization of simultaneous state and federal takings claims in state court. Do *Williamson* and *San Remo*

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[13] See, *e.g.*, *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellant's facial [substantive due process] and [equal protection] claims"). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

apply also to due process and equal protection? This Court should grant this petition to resolve this question.

E. This Appeal Turns on the State-Litigation Rule, not Claim Preclusion.

The decision below is a classic example of how lower courts spring the *Williamson* Trap on takings claimants. Petitioners first brought their state inverse condemnation claims in state court. Thus, they obeyed *Williamson* and the First Circuit's repeated holding that federal takings claims do not exist until a state court has denied state law compensation claims. See, *e.g., Pascoag Reservoir & Dam, LLC v. Rhode Island,* 337 F.3d 87, 91 (1st Cir.), *cert. denied,* 540 U.S. 1090 (2003); *Gilbert v. City of Cambridge,* 932 F.2d 51, 63-65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991).[14] Moreover, as the court of appeals recognized, "res judicata does not apply where a claim could not have been raised in the first litigation." App. 6a-7a (citing, *inter alia,* Restatement (Second) of Judgments § 26(1)(c) (1982)). The outcome below, therefore, should have been simple. If a federal takings claim does not exist at the time of initial state litigation, and claim preclusion does not bar claims that a plaintiff could not raise in the initial state litigation, then claim preclusion cannot bar a federal takings claim raised in a later federal suit.

But the court of appeals avoided this logic through a strained application of claim preclusion. It believed that "the federal takings claim was actually litigated to a final judgment on the merits in state court," because Petitioners' state complaints "identified" the Fifth Amendment and "cited" *First English.* App. 7a (original emphasis). But how could this be? How could Petitioners have litigated federal takings claims in state court if those federal claims

[14] Even though *Pascoag* and *Gilbert* were central to Petitioners' briefing and oral argument, the court of appeals failed to mention either case in the decision below.

*did not yet exist?* Moreover, ripeness goes to the court's jurisdiction. See *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 807 (2003); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733 n.7 (1997). A court either has jurisdiction or it doesn't, and parties cannot create jurisdiction by their pleadings. See, *e.g.*, *The Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 636 (1st Cir. 1989). In other words, contrary to the court of appeals' decision, Petitioners could not have created state court jurisdiction over their federal claims through ancillary references in their state litigating papers to the Takings Clause and *First English.*

Thus, it is important to recognize that the decision below was not merely an application of New Hampshire res judicata principles. To the contrary, this case turns on whether the New Hampshire courts had jurisdiction over federal takings claims when Petitioners brought their state law inverse condemnation action. The answer depends on the meaning of *Williamson*: if the New Hampshire courts did not have jurisdiction over the federal takings claims, then the court of appeals should not have invoked claim preclusion. This Court can provide the definitive answer by squarely addressing the state-litigation rule presented in this petition.

F. Because of the State-Litigation Rule, the Takings Clause is the Only Bill of Rights Provision Barred from Federal Court Review.

Petitioners are the latest in a long line of takings claimants who have been denied access to federal court, due to *Williamson*'s state-litigation rule and application of the preclusion doctrines. *San Remo*'s concurrent litigation rule will further bar federal adjudication of Fifth Amendment claims, because it "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *San Remo,* 545 U.S. at 342 (Rehnquist, C.J., concurring.). This is precisely what has transpired. By the late 1990s, the lower federal courts regularly cited the state-

litigation rule to avoid deciding the merits of Fifth Amendment takings claims. See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203-205 (1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have engaged in a "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoiding the vast majority of takings cases on their merits." Test. of Prof. Daniel Mandelker on H.R. 1534, Before the H. Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property, *reprinted in* 31 Urb. Law. 195, 234 (1999).

With Fifth Amendment claims consigned to state court, whether by virtue of *Williamson's* state-litigation rule or *San Remo*'s authorization of concurrent claims, the result is that citizens can be denied substantive protections of the United States Constitution. State courts like New Hampshire's frequently decline to rely upon or adhere to Fifth Amendment standards to adjudicate property rights claims. See, *e.g. State v. Ball,* 471 A.2d 347, 351-352 (N.H. 1983) ("[T]he right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees"; any federal precedent is "merely ... guidance" and "our results [are not] bound by those decisions").

The Bill of Rights furnishes a minimum national standard for individual rights, and the federal Constitution provides a "floor" of protection. See, *e.g., Mills v. Rogers*, 457 U.S. 291 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In takings cases, however, state court adherence to Fifth Amendment standards has ranged from

random to nonexistent.[15] For example, because Petitioners did not and could not raise Fifth Amendment claims in the state courts, the New Hampshire Supreme Court did not consider whether Petitioners deserved compensation under this Court's seminal takings cases, such as *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978) (multi-factor test to determine government takings liability), or *First English.* Indeed, the New Hampshire court reached a decision directly contrary to this Court's jurisprudence.

Similarly, in *Santini v. Conn. Hazardous Waste Mgmt. Serv.,* 739 A.2d 680 (Conn. 1999), *cert. denied,* 530 U.S. 1225 (2000), the Connecticut Supreme Court rejected the property owner's argument that Fifth Amendment precedent established minimum standards for adjudicating a takings claim brought under the Connecticut constitution. The court stated that federal standards were "irrelevant." 739 A.2d at 688, n.20. Another example occurs under Ohio law, where a takings claimant must prove a loss of all economically viable use to a criminal standard of "beyond a reasonable doubt." *Goldberg Cos. Inc. v. Richmond Heights City Council*, 690 N.E.2d 510, 514 (Ohio 1998). Thus, the *Williamson* state-litigation rule has not only denied takings plaintiffs a federal forum, but in some cases denied adjudications that employ federal standards.

Furthermore, in denying Fifth Amendment claimants access to federal courts, *Williamson* and *San Remo* have negated the critical role of the federal judiciary under 42 U.S.C. § 1983, to oversee and correct actions taken by municipalities "under color of state law" that violate federal civil rights. The "central purpose" of section 1983 "is to provide compensatory relief to those deprived of their

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[15] Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523 (1995).

federal rights by state actors," *Felder v. Casey*, 487 U.S. 131, 141 (1988), by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Congress intended for section 1983 to provide "*immediate* access to the federal courts," and "throw open the doors of the United States courts" for individuals deprived of their constitutional rights. *Patsy v. Fla. Bd. of Regents,* 457 U.S. 496, 504 (1982) (emphasis supplied). But the state-litigation and concurrent claims rules have slammed that federal door shut on takings claimants. And, application of the preclusion doctrines has changed the locks altogether.

G. Thus, *Williamson* Demands Reconsideration.

When this Court decided *Williamson* in 1985, modern takings jurisprudence was still in its infancy. Indeed, not until 1987 in *First English* did this Court decide that monetary compensation was the "self-executing" remedy required by the Takings Clause. 482 U.S. at 315-16. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined. But the most basic, fundamental jurisdictional question—Can a federal court decide a federal takings claim?—is undeciphered.

It is no exaggeration to assert that *all* of takings law, both substantive and procedural, developed by this Court and the lower federal and state courts, hinges on clarification of the *Williamson* state-litigation rule. If this Court truly means to shield Fifth Amendment protections from federal review, respectfully, it needs to say so unequivocally. Whether federal takings claims are reviewable in federal court is a significant constitutional question, and this petition should be granted so the Court can revisit the state-litigation rule.

## II. THIS COURT SHOULD RESOLVE THE SPLINTERED CIRCUIT STANDARDS ON LIABILITY FOR DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

In addition to the Takings Clause takings question discussed above, the Court should grant this petition to decide important questions under the Due Process Clause, upon which the lower courts are irreconcilably split.

### A. This Court's Decisions Regarding Deprivation of Property Without Due Process.

In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), this Court decided that the "substantially advance[s] a legitimate government interest" test from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), "has no proper place in our takings jurisprudence," because "this formula prescribes an inquiry in the nature of a due process ... test ...." *Lingle*, 544 U.S. at 540. The Court never explained what the correct formula *is* to determine when government action deprives private property without due process.

*Lingle* compounds the confusion wrought by *Eastern Enterps. v. Apfel*, 524 U.S. 498 (1998), a 4-1-4 decision. There, a four-Justice plurality decided that legislation requiring a mining company to pay retroactive health benefits to its former employees was unconstitutional. It rendered its decision under a Fifth Amendment takings analysis. However, four dissenting Justices decided that the case should not be resolved on takings grounds but on due process grounds, and ultimately found no due process violation. *Id.* at 568. Justice Kennedy's fifth vote found the statute unconstitutional-not on takings grounds like the plurality did, but on substantive due process grounds. *Id.* at 539-50 (Kennedy, J., concurring in the judgment). In short, this Court itself has been unclear as to the application of the Due Process Clause to property rights claims, and the lower courts need guidance.

B. The Lower Courts are Applying Different and Conflicting Due Process Standards to Deprivations of Property.

Petitioners alleged a due process count in their federal court complaint:

> [T]he denial of permits, to which [Petitioners] were entitled, constitutes a denial of due process. Application of the Ordinance, which was invalid from its inception and was not rationally related to a legitimate government interest, was an arbitrary and capricious action of the Town that denied [Petitioners'] due process.

App. 38a, ¶37. The court of appeals dismissed the due process claim on the merits: "Even where officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation." App. 9a (citing *SWF Arecibo Ltd. v. Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005). But Petitioners never raised a due process claim against *procedures*. The complaint plainly asserts that application of the "invalid, *ab initio*" ordinance was an irrational, arbitrary and capricious government action.

After dismissing Petitioners' due process claim, the court of appeals announced what it believed to be the appropriate test: "Substantive due process prevents governmental power from [1] being used for purposes of oppression, *or* [2] abuse of government power that shocks the conscience, *or* [3] action that is legally irrational in that it is not keyed to any legitimate state interest." App. 9a-10a (emphasis and brackets supplied). Petitioners pleaded their due process claim squarely within the First Circuit's third category. Thus, the allegations should have been accepted as true on a motion to dismiss. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999). The overriding question, however, is which, if any, of the First Circuit's three categories supplies the correct test for a substantive due process claim for deprivation of property rights.

*Lingle* stated that the "substantially advance a legitimate government interest" formula "prescribes an inquiry in the nature of ... due process." *Lingle,* 544 U.S. at 540. So, has the "substantially advances" test been switched, from takings to due process? The court implied as much: "The 'substantially advances' formula suggests a means-end test .... An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 542. That dictum, however, will not resolve the conflicts on this issue among the courts of appeals.

1. "Rational Relationship." Some circuits use a traditional "rational relationship" test for claims alleging deprivations of due process in property. See, *e.g., S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 594 (4th Cir. 2002) (in regulating an explosives business, "the County's actions were rationally related to a legitimate government purpose"); *Greater Chicago Combine and Ctr., Inc. v. City of Chicago*, 431 F.3d 1065, 1071-72 (7th Cir. 2005) (to succeed on a substantive due process claim, the challenged ordinance must have "no substantial relation to the public health, safety, morals or general welfare") (internal quotes omitted); *Iowa Coal Mining Co., Inc. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001) (county did not act "truly irrational" or violate substantive due process when it enacted an ordinance to prevent mining lessee from landfilling empty mines); *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (statute is not invalid under substantive due process unless it has "'no substantial relation to the public health, safety, morals or general welfare'") (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); *Crider v. Bd. of County Comm'rs of the County of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001) (substantive due process violated if government actions have "no conceivable rational relationship to the exercise of the state's traditional police power through zoning") (internal quotations omitted).

2. "Shocks The Conscience." Like the court of appeals below, several circuits supplement the traditional "rational relationship" test with a "shocks the conscience" standard.[16] These decisions do not explain when "shocks the conscience" is the more appropriate formulation to trump "rational relationship" in any case. See, *e.g., Conroe Creosoting Co. v. Montgomery County,* 249 F.3d 337, 341 (5th Cir. 2001) (when a property owner claimed the county violated his right to substantive due process, court asked whether the government action was so egregious as to shock the conscience); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902-03 (8th Cir. 2006) (no substantive due process violation occurred because an ordinance restricting usage of property as a firearm dealership was not "so irrational and egregious as to shock the conscience"); *Santana v. City of Tulsa*, 359 F.3d 1241, 1244 (10th Cir. 2004) (applying a shocks the conscience test to hold that the city did not violate substantive due process rights when it removed discarded items from plaintiff's property under a local nuisance law).

3. Hybrid Approach. The Third Circuit recently considered a substantive due process claim in a dispute concerning approval for a sand and gravel extraction business. It held that the correct due process standard depends on which government branch takes action. If the claimant challenges *executive* action (like the application of an ordinance to a specific piece of property), then "shocks the conscience" controls. However, *legislative* action (such as a facial challenge to an ordinance itself) "will withstand substantive due process challenge if the government 'identifies the legitimate state interest that the legislature

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[16] This Court has never applied a "shocks the conscience" standard in a property rights case. It has used that standard to test a due process claim challenging local law enforcement in an emergency situation. *County of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998) (police vehicular pursuit case).

could rationally conclude was served by the statute.'" *County Concrete Corp. v. Twp. of Roxbury,* 442 F.3d 159, 169 (3d Cir. 2006) (quoting *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000)).[17]

4. "Arbitrary and Capricious." The Sixth Circuit, in a pre-*Lingle* case, said that "arbitrary and capricious" and "shocks the conscience" mean the same thing. *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003). But post-*Lingle,* the Sixth Circuit "recognized that a substantive due process violation occurs when arbitrary and capricious government action deprives an individual of a constitutionally protected property interest"—without discussing the relationship between "arbitrary and capricious" and "shocks the conscience." *Warren v. City of Athens*, 411 F.3d 697, 707 (6th Cir. 2005). On the other hand, the Second Circuit believes "arbitrary" is synonymous with "irrational." *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001) (due process plaintiff must show "that the defendants infringed [on a property interest] in an arbitrary or irrational manner").

In summary, there is no uniform, national standard for how lower federal courts treat Fifth and Fourteenth Amendment due process claims where the core facts concern deprivation of private property. The petition should be granted to resolve this evident conflict within and among the circuit courts of appeals.

## III. CONCLUSION.

Whether the federal courts can and must decide the merits of claims brought under a Bill of Rights provision is an issue of extraordinary constitutional importance.

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[17] As if that distinction was easy to discern. See *Clinton v. City of New York,* 524 U.S. 417, 481 (1998) ("'The Court does not 'carry out the distinction between legislative and executive action with mathematical precision' or 'divide the branches into watertight compartments'").

In *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), this Court announced: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth, should be relegated to the status of a poor relation." If federal courts are not available to decide Fifth Amendment claims, then the Takings Clause is not just a "poor relation" to other constitutional guarantees. It has been disowned altogether.

Personal freedom finds tangible expression in the ownership of property. Individual rights should not vary based on the particular standards of government liability employed in a given circuit. The Court's review is also warranted to resolve the wide split on the proper due process test when property rights are at stake.

For all of the foregoing reason, the petition for a writ of certiorari should be granted.

July 21, 2006

Respectfully submitted,

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Supreme Court, U.S.
FILED
(2)
06-112 JUL 21 2006
OFFICE OF THE CLERK

No. 05-____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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HENRY TORROMEO and MDR CORPORATION,
*Petitioners*,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
*Respondent.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF APPENDICES

A. Decision, *Torromeo, et al. v. Town of Fremont*, No. 04-2547 (1st Cir. Feb. 21, 2006) ..... App. 1a

B. Office of the Clerk, U.S. Supreme Court, *Letter Granting Application for Extension of Time to File Petition for Certiorari to July 21, 2006* (dated June 28, 2006) ..... App. 12a

C. Order Denying Petition for Rehearing and Suggestion for Rehearing *en banc*, *Torromeo, et al. v. Town of Fremont*, Civil No. 04-2547 (1st Cir. Apr. 11, 2006) ..... App 14a

D. Order, *Torromeo, et al. v. Town of Fremont*, Civil No. 03-481-SM, Opinion No. 2004 DNH 148 (D. N.H. Oct. 12, 2004) ..... App. 15a

E. Complaint for Deprivation of Civil Rights Under 42 U.S.C. § 1983, *Torromeo, et al. v. Town of Fremont*, Civil No. 03-481-SM (D. N.H.) filed Nov. 5, 2003 ..... App. 29a

F. Excerpt From Respondent's Brief in Opposition, to Petition for Writ of Certiorari, *Torromeo, et al. v. Town of Fremont*, No. 02-1507 May 9, 2003 ..... App. 40a

G. December 13, 2002 Opinion of New Hampshire Supreme Court, Denying Takings Liability .. App. 43a

H. September 26, 2001 Town of Fremont's Notice of Appeal to New Hampshire Supreme Court ... App. 50a

I. September 26, 2001 Order of Rockingham Superior Court, Awarding Damages to Petitioners ..... App. 58a

## TABLE OF APPENDICES
**(continued)**

J. March 19, 2001 Order of Rockingham Superior Court, on Motion of Reconsideration ..... App. 69a

K. June 26, 2000 Summary Affirmance of New Hampshire Supreme Court ..... App. 74a

L. Writ of Summons and Attachment, *MDR Corporation v. Town of Fremont* [inverse condemnation action], March 21, 2000 ..... App. 75a

M. Writ of Summons and Attachment, *Torromeo v. Town of Fremont*, [inverse condemnation action], March 21, 2000 ..... App. 79a

N. January 31, 2000 Order of Rockingham Superior Court, regarding Torromeo Industries' Vested Lots ..... App. 84a

O. December 27, 1999 Order of Rockingham Superior Court, Declaring Growth Control Ordinance "Invalid Ab Initio" ..... App. 91a

P. New Hampshire Constitution, First Part, Article 12 ..... App. 95a

**APPENDIX A**

# United States Court of Appeals For the First Circuit

No. 04-2547

HENRY TORROMEO and MDR CORPORATION,
Plaintiffs, Appellants,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before
Selya, Lipez, and Howard, Circuit Judges.

Timothy S. Hollister with whom Patrick M. Fahey, Shipman & Goodwin, LLP, Sumner F. Kalman, Thea S. Valvanis, and Duane J. Desiderio were on brief, for appellants.

John J. Ryan with whom Casassa and Ryan, Eric Kane and Devine, Millimet & Branch, PA were on brief, for appellee.

February 21, 2006

**HOWARD, Circuit Judge.** This appeal arises from a dispute between Plaintiffs Henry Torromeo and MDR

Corporation and Defendant Town of Fremont, New Hampshire over the Town's delay in issuing certain building permits for property owned by Plaintiffs. Plaintiffs sued in federal court under 42 U.S.C. § 1983, claiming that the Town's delay constituted both a violation of the Takings Clause of the Fifth Amendment and a breach of the due process and equal protection guarantees of the Fourteenth Amendment.[1] The district court granted the Town's motion to dismiss under Fed. R. Civ. P. 12 (b) (6) because the complaint was barred by the Rooker-Feldman doctrine and res judicata. We affirm.

The case has a somewhat involved factual and procedural history. In the late 1990s, Plaintiffs received approval from the Fremont Planning Board for planned housing subdivisions. Subsequently, however, the Town enacted a growth control ordinance empowering the Board to limit the number of building permits that it would issue for new residential housing. The Board thereafter implemented such a limitation, which resulted in Plaintiffs being denied the needed permits.

Displeased, Plaintiffs sued in New Hampshire Superior Court, challenging the validity of the growth control ordinance and seeking an injunction compelling the Town to issue the building permits. The court granted the injunction because the Town had failed to satisfy a statutory prerequisite before adopting the ordinance. After the New Hampshire Supreme Court affirmed that ruling, the Town issued the permits.

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[1] The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. See Dolan v. Tigard, 512 U.S. 374, 383-84 (1994).

Plaintiffs then filed additional separate suits in the New Hampshire Superior Court, seeking compensation for the temporary taking of their property during the period in which they were wrongfully denied the permits. Their complaints referenced both the Takings Clause of the Fifth Amendment to the United States Constitution and the analogous provision of the New Hampshire Constitution, Part 1, Article 12. In addition, the complaints cited United States Supreme Court authority interpreting the federal Takings Clause. The cases were consolidated.

The superior court ruled that Plaintiffs were entitled to compensation to offset the losses from the wrongly-denied permits. After a trial on damages, the court awarded MDR $71,600 and Torromeo $23,800. The Town appealed to the New Hampshire Supreme Court which reversed. See Torromeo v. Fremont, 813 A.2d 389 (N.H. 2002). It reasoned that compensation is due for a temporary taking only where the losses are caused by a municipality's enactment of an unconstitutional ordinance. Id. at 392. Because the growth control ordinance had not been held unconstitutional, but merely invalid due to the Town's failure to follow statutory enactment procedures, no compensation was due. Id. Plaintiffs petitioned for a writ of certiorari in the United States Supreme Court, claiming that the New Hampshire Supreme Court's opinion conflicted with the Fifth Amendment's Takings Clause. The petition was denied. See 539 U.S. 923 (2003).

After the state-court judgment became final, Plaintiffs filed the present action. Their complaint claimed that the Town failure to compensate them justly for a taking violated the Fifth Amendment. They also alleged a violation of their substantive due process rights on the ground that the Town's denial of the building permits was

"arbitrary and capricious," and a violation of their equal protection rights because the Town treated them differently from "other similarly situated property owners."

The district court dismissed the complaint on two grounds. It first concluded that the complaint had to be dismissed under the Rooker-Feldman doctrine because the Plaintiffs' "federal lawsuit [was] little more than a thinly disguised effort to reverse the New Hampshire Supreme Court's decision rejecting their claimed entitlement, under the Fifth Amendment, to the damages for the temporary 'taking' of their real property." Torromeo v. Fremont, No. 03-481, 2004 WL 2300481, at *4 (D.N.H. 2004). The court alternatively held the complaint was res judicata because the Fifth Amendment claim was in fact adjudicated in the state-court proceeding, and the due process and equal protection claims could have been adjudicated in that proceeding. See id. at *6-7.

We review the district court's dismissal order de novo. See Roth v. United States, 952 F.2d 611, 613 (1st Cir. 1991). We will affirm only if the well-pleaded facts fail to establish the Town's liability under some actionable legal theory. See Rodi v. S. New England Sch. of Law, 389 F.3d 5, 13 (1st Cir. 2004).

After the district court dismissed Plaintiffs' complaint, the Supreme Court decided Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), which substantially limited the reach of the Rooker-Feldman doctrine. See Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 23-24 (1st Cir. 2005) (describing the limitations placed on Rooker-Feldman by Exxon Mobil). Because we agree that Plaintiffs' Fifth Amendment claim is res judicata, we bypass the Rooker-Feldman issue and proceed to the

district court's alternative ruling.

Under federal law, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was entered." Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 81 (1984). This principle applies to a § 1983 action brought in federal court following a state-court judgment. Id. at 83-85. Thus, the effect of the New Hampshire court's final judgment on Plaintiffs' federal action is determined by applying New Hampshire's res judicata law.

In New Hampshire, "the essence of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action." In re Juvenile, 888 A.2d 422, 425 (N.H. 2005). The doctrine precludes litigation in a later case of matters actually litigated, and matters that could have been litigated, in the earlier action. See Brzica v. Trustees of Dartmouth Coll., 791 A.2d 990, 999 (N.H. 2002). For res judicata to apply, three elements must be satisfied: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action. See id. "Cause of action" is broadly defined to mean "the right to recover, regardless of the theory of recovery." McNair v. McNair, 856 A.2d 5, 16 (N.H. 2004).

At first blush, this case appears to fall squarely within New Hampshire's res judicata rules. The parties to the federal action and the state actions were identical. The same cause of action was before the federal court as was before the state court because both suits sought compensation for harm caused by the Town's wrongful

denial of the permits. And the New Hampshire court entered final judgments on the merits of Plaintiffs' state-court actions.

There is, however, a complication. In 1985, the United States Supreme Court held that a takings claim under the Fifth Amendment is not ripe until the plaintiff has sought compensation through available state procedures. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985); see also Deniz v. Guaynabo, 285 F.3d 142, 146 (1st Cir. 2002). In 1989, building on Williamson County, the New Hampshire Supreme Court held that federal-takings and related federal due-process claims raised in a state-court proceeding, alongside state-law claims for compensation, had to be dismissed without prejudice because they were not ripe until the state-law claims were resolved. See Blue Jay Realty Trust v. Franklin, 567 A.2d 188, 190-91 (N.H. 1989).[2]

Invoking Blue Jay Realty, Plaintiffs argue that res judicata does not bar their federal-court action because (1) their federal claims were not litigated in the state-court action and (2) they were not required to raise these claims in the state-court action because they were not ripe. See In re Iannochino, 242 F.3d 36, 43 n.4 (1st Cir. 2001) (res

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[2] Last term, the Supreme Court decided San Remo Hotel, L.P. v. San Francisco, -- U.S. --, 125 S.Ct. 2491 (2005), which calls Blue Jay Realty into substantial doubt. The San Remo Court held that Williamson County "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution." Id. at 2506.

judicata does not apply where a claim could not have been raised in the first litigation); see also Restatement (Second) of Judgments § 26(1) (c) (1982) (res judicata does not bar a claim for relief in a subsequent action where the claim was not raised in the initial action "because of . . . restrictions on [the court's] authority to entertain multiple theories . . . in a single action").

But Plaintiffs' argument fails because the federal takings claim was actually litigated to a final judgment on the merits in the state court. As noted above, Plaintiffs' state-court complaints identified the Takings Clause of the Fifth Amendment to the United States Constitution as a basis for the cause of action. The complaints also cited First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987), a Supreme Court case interpreting the Takings Clause. In addition, after losing in the New Hampshire courts, Plaintiffs filed a writ of certiorari with the United States Supreme Court claiming that the New Hampshire decision violated their rights under the federal Takings Clause. These filings demonstrate that a federal takings claim was actually litigated in the state-court action. See C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4406, at 143 (2d ed. 2002) (stating that formal pleadings and other filings are relevant to determining the claims that were advanced in a prior suit). Indeed, Plaintiffs admitted as much in their federal complaint, which states that the state-court proceedings were actions "to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions."[3] The

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[3] Plaintiffs point to the fact that the New Hampshire Supreme Court cited only cases interpreting the New Hampshire Constitution as evidence that the litigation did not involve a

district court thus correctly concluded that res judicata barred Plaintiffs' Fifth Amendment claim.[4] See Peduto v. N. Wildwood, 878 F.2d 725, 728-29 (3d Cir. 1989) (affirming res judicata dismissal of a Takings Clause claim filed in federal court where the claim was litigated to a final judgment on the merits in a prior state-court proceeding).

We turn now to the Plaintiff's substantive due process and equal protection claims. Whether res judicata bars these claims presents a somewhat closer question. These additional federal-law theories were not litigated in

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federal takings claim. See Torromeo, 813 A.2d at 392. But the New Hampshire Supreme Court has stated that where a plaintiff raises state and federal takings claims in the same action, the court need not consider the claims independently because the Fifth Amendment's Takings Clause is no more protective than its state analogue. See Sanderson v. Candia, 787 A.2d 167, 169 (N.H. 2001). Therefore, the court's decision that the Town did not violate the takings provision of the state constitution means, a fortiori, that, in its view, there was no unlawful taking under federal law.

[4] Plaintiffs also assert that, even if the elements of res judicata are satisfied, we should permit the Fifth Amendment claim to proceed because New Hampshire law imbues courts with discretion to decline to apply res judicata. We have not found New Hampshire authority to this effect. The most that can be said is that New Hampshire applies res judicata on a "case-by-case basis." Cook v. Sullivan, 829 A.2d 1059, 1063 (N.H. 2003). But even assuming that New Hampshire law affords courts some discretion in applying res judicata, Plaintiffs have failed to explain why their case is exceptional. See Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 941 (8th Cir. 1995) (doubting that res judicata was a discretionary doctrine under Minnesota law, but concluding that, even if discretion existed, res judicata barred a claim where the plaintiff failed to show that applying the doctrine worked an "injustice").

the state-court action, and there is a plausible argument that they are not res judicata because they could not have been litigated in that action under Blue Jay Realty. See Restatement of Judgments (Second), supra. On the other hand because, as just explained, Plaintiffs ignored the Blue Jay Realty rule by litigating their takings claim in the state-court action, one could argue that the due process and equal protection claims should have been raised along with the takings claim. In any event, we need not decide how New Hampshire's res judicata law would apply to this unique situation because the due process and equal protection claims fail as a matter of law. See Carroll v. Xerox Corp., 294 F.3d 231, 241 (1st Cir. 2002) (court of appeals may affirm the dismissal of complaint on any ground supported by the record).

We begin with the substantive due process claim. We recently explained the limits on substantive due process claims arising from land-use disputes:

> This Court has repeatedly held that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks

> the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest. Although we have the left door slightly ajar for federal relief in truly horrendous situations, the threshold for establishing the requisite abuse of government power is a high one indeed.

SFW Arecibo Ltd. v. Rodriguez, 415 F.3d 135, 141 (1st Cir. 2005) (internal citations omitted).

In Arecibo, real estate developers sued after a state planning board incorrectly determined that their building permit had expired. Id. at 137. When suit was filed, the state court had already determined that the permit had been wrongly revoked. Id. at 138. We affirmed the dismissal of the substantive due process claim because the complaint stated "[i]n its strongest form . . . that the [p]lanning board made an erroneous decision in violation of state law," which is insufficient to establish a substantive due process violation. Id. at 141. So too here. Plaintiffs allege that the Town violated substantive due process by enacting the growth control ordinance without following the procedures mandated by New Hampshire law. But, as in Arecibo, the claim is only that the Town's violation of state law caused Plaintiffs harm. This is not enough. See id. at 141; see also Licari v. Ferruzzi, 22 F.3d 344, 349 (1st Cir. 1994) (affirming dismissal of substantive due process claim based on allegations that a town planning board improperly revoked the developer's building permits and delayed processing and approval of an application for an amended permit); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 32 (1st Cir. 1991) (affirming dismissal of substantive due process claim where developer alleged that government agency failed to comply with agency regulations or practices in the review and approval process of construction

plans).

The equal protection claim fares no better. Plaintiffs contend that they stated a viable equal protection claim by pleading that, in denying the permits, the Town treated them differently from other "similarly situated property owners." But only in "extreme circumstances" will a land-use dispute give rise to an equal protection claim. Arecibo, 415 F.3d at 142. It is insufficient for a plaintiff merely to allege that the permitting entity violated state law in denying a permit request. Id. "Absent facts reflecting more fundamental discrimination, [a plaintiff] ha[s] not stated a claim under the Equal Protection Clause of the Fourteenth Amendment." Id. Yet, that is all that is alleged here.

**Affirmed.**

**APPENDIX B**

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

June 28, 2006

Mr. Timothy Salo Hollister
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Re: Henry Torromeo, et al.
v. Town of Fremont, New Hampshire
Application No. 05A1227

Dear Mr. Hollister:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-mentioned case has been presented to Justice Souter, who on June 28, 2006 extended the time to and including July 21, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/
Jeffrey Atkins
Case Analyst

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Timothy Salo Hollister
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One Constitution Plaza
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Clerk
United States Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way
Boston, MA 02210

**APPENDIX C**

**United States Court of Appeals**
**For the First Circuit**

No. 04-2547

HENRY TORROMEO; MDR CORPORATION
Plaintiffs – Appellants

v.

TOWN OF FREMONT, NEW HAMPSHIRE
Defendant – Appellee

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Before

Boudin, Chief Judge,
Torruella and Selya, Circuit Judges,
Lynch, Lipez and Howard Circuit Judges,

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ORDER OF COURT

**Entered: April 11, 2006**

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
RICHARD CUSHING DONOVAN, Clerk
By: /s/ Julie Gregg
Operations Manager

[cc: Duane Desiderio, Esq., Sumner Kalman, Esq., Thea Vlvanis, Esq., Timothy Hollister, Esq., John Ryan, Esq., Eric Kane, Esq., Donald Gardner, Esq. Michael Berger, Esq.]

**APPENDIX D**

**NOT FOR PUBLICATION**

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Henry Torromeo and
MDR Corporation,
Plaintiffs

v.

Civil No. 03-481-SM
Opinion No. 2004 DNH 148

Town of Fremont,
Defendant

**ORDER**

Plaintiffs, Henry Torromeo and MDR Corporation, bring this action against the Town of Fremont, seeking damages for what they say was the Town's unlawful and unconstitutional delay in issuing various building permits. See generally 42 U.S.C. § 1983. According to plaintiffs, by unlawfully delaying the issuance of building permits requested by them, the Town temporarily effected a taking of their property for public use, without paying them just compensation. Additionally, plaintiffs claim the Town deprived them of Due Process and Equal Protection, in violation of the United States Constitution.

The Town moves to dismiss plaintiffs' three-count complaint, saying their claims are barred by the Rooker-

Feldman doctrine and res judicata. Plaintiffs object.

**Standard of Review**

When ruling on a motion to dismiss, the court must "accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff's favor and determine whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory." Martin v. Applied Cellular Tech., Inc., 284 F.3d 1, 6 (1st Cir. 2002). Dismissal is appropriate only if "it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." Langadinos v. American Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). See also Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 472 (1st Cir. 2002). Notwithstanding this deferential standard of *review,* however, the court need not accept as true a plaintiff's "bald assertions" or conclusions of law. See Resolution Trust Corp. v. Driscoll, 985 F.2d 44, 48 (1st Cir. 1993) ("Factual allegations in a complaint are assumed to be true when a court is passing upon a motion to dismiss, but this tolerance does not extend to legal conclusions or to `bald assertions.'") (citations omitted). See also Chongris v. Board of Appeals, 811 F.2d 36, 37 (1st Cir. 1987).

Here, in support of its motion to dismiss, the Town relies upon various state and federal court filings made by plaintiffs in prior litigation, opinions issued by New Hampshire state courts, and the United States Supreme Court's denial of plaintiffs' petition for writ of certiorari. Typically, a court must decide a motion to dismiss exclusively upon the allegations set forth in the complaint (and any documents attached to that complaint) or convert the motion into one for summary judgment. See Fed. R. Civ. P. 12(b). There is, however, an exception to that general rule:

> [C]ourts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.

Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993) (citations omitted). See also Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998). Since plaintiffs do not dispute the authenticity of the documents upon which the Town relies, the court may properly consider those documents without converting the Town's motion to dismiss into one for summary judgment.

**Background**

Torromeo owns approximately 100 acres in the Town of Fremont, and MDR owns approximately 50 acres. Both parcels are zoned to permit residential construction. In February of 1997, the Town approved Torromeo's subdivision plan for "Mason's Corner," and that plan was recorded with the county registry of deeds. Approximately two and one-half years later, the Town approved MDR's subdivision plan for "Glidden Hill Estates," and that plan, too, was recorded in the county's land records.

In March of 1999, the Town adopted a growth control ordinance (the "Ordinance") which authorized the Fremont Planning Board to limit the number of building permits issued annually for the construction of residential units within the Town. Pursuant to that ordinance, the Town implemented "Growth Control and Permit Limitations," which limited to 16 the number of building permits that would be issued to property owners during the one-year period between April 14, 1999, and April 13, 2000. Within that time frame, MDR applied for six permits to construct single-family units at Glidden Hill Estates. The

Town issued only five and informed MDR that it must wait until April of 2000 before additional building permits would issue for that development. Later, Torromeo sought building permits for the five remaining lots at Mason's Corner. That request was, however, denied since the Town had already issued the maximum number of building permits for that year under the Ordinance.

In August of 1999, MDR brought a petition for declaratory judgment in Rockingham County Superior Court, alleging that the Town's Ordinance was not enacted in compliance with state law and was, therefore, unenforceable. The state court agreed, and ruled that the Ordinance was invalid dating back to its adoption. The New Hampshire Supreme Court summarily affirmed the trial court's decision. Accordingly, the Town stopped enforcing the Ordinance against MDR and issued the requested building permits.[1]

Torromeo also filed a petition for declaratory judgment in Rockingham Superior Court, claiming that because the Town approved his subdivision plan prior to adopting the Ordinance, it was exempt from the provisions of the Ordinance. Again, the court agreed and ordered the Town to issue the requested building permits. The Town

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[1] Under New Hampshire law, municipalities are authorized to "regulate and control" the timing of local development by, for example, enacting growth control ordinances such as the one adopted by Fremont. N.H. Rev. Stat. Ann. 674:22. Importantly, however, "[a]ny ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program." Id. Fremont's ordinance was declared void ab initio because the state court concluded that the Town failed to adopt a valid capital improvement program.

complied.

In March of 2000, plaintiffs joined forces and filed an action in the Rockingham County Superior Court seeking damages from the Town for inverse condemnation. Pointing to the fact that the state court previously ruled the Town's Ordinance invalid, plaintiffs claimed entitlement to damages for the temporary "taking" of their property (i.e., the delayed issuance of the building permits). In support of their view, plaintiffs invoked provisions of both the state and federal constitutions. See Complaint at para. 21 ("On March 21, 2000, Plaintiffs each filed actions in the Rockingham County Superior Court to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions." (emphasis supplied).

The state trial court agreed with plaintiffs, and concluded that they were entitled to compensation for the economic loss they suffered as a result of the Town's delay in issuing the building permits. Accordingly, the court ordered the Town to pay Torromeo damages in the amount of $23,800, and MDR damages in the amount of $71,600.

The Town appealed those decisions to the New Hampshire Supreme Court. In their joint brief, plaintiffs cited both the state and federal constitutions in support of their view that the lower state court had properly found that they were entitled to compensation for the temporary "taking" of their property. See, e.g., Exhibit D to defendant's motion to dismiss, plaintiffs' brief to the New Hampshire Supreme Court, at 8 ("The Town, by imposing the invalid Growth Ordinance, caused a `taking' of plaintiffs' property violating their protected right to use and enjoy their property as a fundamental right protected by both our State and Federal Constitutions. . . The Constitution prohibits takings without compensation."). See

also id. at 11 ("The right to use and enjoy one's property is a fundamental right protected by both our State and Federal Constitution. The Fifth Amendment of the United [States] Constitution provides, `nor shall private property be taken for public use without just compensation.'").

The New Hampshire Supreme Court concluded that plaintiffs were not entitled to compensation and, therefore, reversed the trial court's damages award. Torromeo v. Town of Fremont, 148 N.H. 640 (2002). Specifically, the court held that while the Town's Ordinance had previously been declared invalid, plaintiffs had not demonstrated that it was unconstitutional. The court went on to discuss the distinction between a local ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. It then noted that, absent proof from plaintiffs that the Ordinance was unconstitutional, rather than merely procedurally flawed, "this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy." Id. at 644. Accordingly, the court held that "plaintiffs are not entitled to damages, and . . . their only remedy is issuance of the erroneously-denied building permits." Id.

Plaintiffs sought review by the United States Supreme Court. Again, they relied upon the federal constitution in support of their view that they were entitled to compensation from the Town for the temporary taking of their property. See, e.g., Exhibit F to defendant's motion, plaintiffs' petition for writ of certiorari at 2 ("Certiorari should be granted to clarify that a municipality can violate the Takings Clause when it enforces an illegal land-use law, which a court declares was invalid from the start, and refuses to provide the constitutional remedy of `just compensation' promised by the Fifth Amendment."). The

Supreme Court denied plaintiffs' petition for certiorari. Torromeo v. Town of Fremont, 539 U.S. 923 (2003).

Having been denied relief by New Hampshire Supreme Court (and the United States Supreme Court), plaintiffs filed this federal suit against the Town. In their three-count complaint, plaintiffs allege: (1) the "application of the Town's Growth Control Ordinance . . . deprived [them] of the economic use of their respective properties, in violation of the Fifth and Fourteenth Amendments." Complaint at para. 32; (2) the Town's denial of building permits, "to which plaintiffs were entitled, constitutes a denial of due process." Complaint at para. 37; and (3) they were "treated disparately because they were not permitted to receive building permits solely by virtue of the Town's unreasonable application of the illegal Ordinance to their respective projects." Complaint at para. 41. As noted above, the Town moves to dismiss plaintiffs' claims, invoking the Rooker-Feldman doctrine and principles of res judicata.

**Discussion**

I. The Rooker-Feldman Doctrine.

The Rooker-Feldman doctrine precludes a federal district court from reviewing a final judgment entered in a state court, and from considering claims that are inextricably intertwined with those raised in the state court proceeding. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983). See also Wang v. New Hampshire Bd. of Registration in Medicine, 55 F.3d 698, 703 (1st Cir. 1995). Federal claims are inextricably intertwined with state court proceedings (even if precisely the same claims were not raised previously in state litigation) if the party had an opportunity to raise those claims in the state court and if their resolution in federal

court would effectively provide a form of federal appellate review of the state court's decision. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring).

Moreover, once a state court issues a final judgment, a federal district court lacks jurisdiction to review that decision even if the state judgment as patently wrong or was entered following patently unconstitutional proceedings. See Feldman, 460 U.S. at 486. Thus, a litigant may not seek to reverse a final state court judgment "simply by casting his complaint in the form of a civil rights action." Ritter v. Ross, 992 F.2d 750, 754 (7th Car. [sic] 1993) (citation omitted).

Here, plaintiffs' federal suit as little more than a thinly disguised effort to reverse the New Hampshire Supreme Court's decision rejecting their claimed entitlement, under the Fifth Amendment, to damages for the temporary "taking" of their real property. Consequently, that constitutional claim is "foreclosed by a textbook application of the Rooker-Feldman doctrine."
Picard v. Members of the Employee Ret. Board, 275 F.3d 139, 145 (1st Cir. 2001).

The same is true with regard to plaintiffs' Fourteenth Amendment claims (counts two and three), which are "inextricably intertwined" with their Fifth Amendment claim. As the court of appeals for this circuit has observed:

> Where a party did not actually present its federal claims in state court, Rooker-Feldman forecloses lower federal court jurisdiction over claims that are "inextricably intertwined" with the claims adjudicated in a state court. A federal claim is inextricably intertwined with the state-court claims if the

> federal claim succeeds only to the extent that the state court wrongly decided the issues before it.

Sheehan v. Marr, 207 F.3d 35, 39-40 (1st Cir. 2000) (citations and internal punctuation omitted). In this case, to rule in plaintiffs' favor on their Fourteenth Amendment claims would, in essence, require this court to reverse the New Hampshire Supreme Court's holding that plaintiffs failed to demonstrate that the Ordinance was unconstitutional, that they "are not entitled to damages, and that their only remedy is issuance of the erroneously-denied building permits." Torromeo v. Town of Fremont, 148 N.H. at 644. The Rooker-Feldman doctrine plainly provides that this court lacks jurisdiction to issue such a ruling. See, e.g., Hill v. Town of Conway, 193 F.3d 33, 40 (1st Cir. 1999) ("Appellants in the face of a Superior Court determination that they `are not entitled to damages,' have sought in their § 1983 suit a `Judgment . . . awarding an amount of damages that will fairly compensate . . . for the taking of their real property.' In short, . . . the relief for which the plaintiffs prayed would, if granted, effectively void the state court's judgment. As the district court properly determined, Rooker-Feldman precludes such an adjudication.") (citation and internal quotation marks omitted).

In support of their view that the Rooker-Feldman doctrine does not preclude relitigation of their federal constitutional claims in this forum, plaintiffs rely on Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003). That reliance is, however, misplaced. First, unlike the plaintiff in Santini, these plaintiffs were not precluded from litigating their federal constitutional claims in state court. See id. at 129 ("Santini did not, and could not, present his federal claim to the state court. . . . the Connecticut state courts would not have adjudicated

Santini's federal takings claim [even] if he had presented it to them."). In fact, as they unequivocally assert in their complaint, plaintiffs in this case actually advanced their federal constitutional claims in state court. See Complaint at para. 21.

Moreover, in Santini, the court of appeals held that a plaintiff who must, pursuant to Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), litigate his or her takings claims in state court, may specifically notify the court that he or she is reserving any federal constitutional claims for resolution by the federal district court.

> While we have not previously held that parties may use the England [v. Louisiana State Bd. of Med. Examiners, 375 U.S. 411 (1964)] reservation procedure in cases that did not properly originate in federal court, we deem it appropriate to permit parties like Santini, who litigate state-law takings claims in state court involuntarily, to reserve their federal takings claims for determination by a federal court.
>
> * * *
>
> [P]arties may explicitly reserve their federal takings claims, making clear to the state court and adverse parties that they intend to bring a federal takings claim in federal court once the litigation of the state-law claim has been completed.

Santini, 342 F.3d at 130 (emphasis supplied). Here, however, plaintiffs never gave any indication to the state courts (or opposing counsel) that they were expressly

"reserving" their federal constitutional claims for resolution in the federal forum. In fact, as noted above, plaintiffs actually litigated those claims.[2]

II. Res Judicata.

Even if the plaintiffs' constitutional claims were not precluded by virtue of the Rooker-Feldman doctrine, they would be barred by the doctrine of res judicata.

The federal full faith and credit statute, 28 U.S.C. § 1738, commands federal courts to employ state rules of res judicata when determining the preclusive effect, if any, to be given to a prior state court determination. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); Kremer v. Chemical Constr. Corp., 456

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[2] It is, perhaps, worth noting that the Court of Appeals for the First Circuit has expressly rejected the use of an England reservation of federal claims in a condemnation/takings-case quite similar to this one.

> [Plaintiff] argues that the federal constitutional issues were not raised in the state proceedings, but rather were reserved under England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). The rule laid down in England is not applicable to this case. Section 1983 does not override state preclusion law by allowing plaintiffs to first proceed to judgment in state courts and then turn to federal courts for adjudication of federal claims. Thus plaintiff's argument re[garding] England is meritless.

Griffin v. Rhode Island, 760 F.2d 359, 360 n.1 (1st Cir. 1985) (parallel citations omitted). That case was, however, decided before the Supreme Court issued its opinion in Williamson.

373, 380 (1985); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468 (1982). Accordingly, if the Rooker-Feldman doctrine did not preclude this court from hearing plaintiffs' constitutional claims, the principles of res judicata, as developed by the New Hampshire Supreme Court, would apply.

Under New Hampshire law, "[t]he doctrine of res judicata precludes the litigation in a later case of matters actually litigated, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action." In re Alfred P., 126 N.H. 628, 629 (1985) (citations omitted). "In order for res judicata to apply to a finding or ruling, there must be `a final judgment by a court of competent jurisdiction [that] is conclusive upon the parties in a subsequent litigation involving the same cause of action.'" In re Donovan, 137 N.H. 78, 81 (1993) (quoting Marston v. U.S. Fidelity & Guar. Co., 135 N.H. 706, 710 (1992)).

In other words, for the doctrine of res judicata to apply, "three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action." Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 454 (2002). The term "cause of action" means the "right to recover, regardless of the theory of recovery." Eastern Marine Constr. Corp. v. First S. Leasing, 129 N.H. 270, 274 (1987) (citations omitted).

Here, each of those three essential elements is present. As to the existence of the first and third elements, there can be little doubt that the parties in the two proceedings are identical and the state supreme court resolved plaintiffs' claims against them on the merits.

Finally, the "causes of action" advanced (and the underlying facts upon which those claims are based) in the two proceedings are also identical. In both this proceeding and the earlier state court proceeding, plaintiffs asserted that the Town's delay in issuing the requested building permits under an invalid local ordinance amounted to an unconstitutional taking of their property and, therefore, entitled them to compensation. While plaintiffs may not have articulated their claimed entitlement to damages in precisely the same way in this and the earlier state court litigation, the "causes of action" are identical: claims for compensation stemming from the allegedly unconstitutional (albeit temporary) withholding of the requested building permits.

Finally, even if one could reasonably conclude that the causes of action advanced in the state court litigation are not identical to the Fourteenth Amendment claims advanced in this proceeding, it is beyond doubt that plaintiffs could have advanced their Fourteenth Amendment claims in the state court proceeding (and, as noted above, it is equally clear that they did not reserve those claims under England). Consequently, those claims are barred by the doctrine of res judicata, which precludes relitigation of all matters actually litigated and any matters that could have been litigated in the same proceeding. See Appeal of Univ. System of N.H. Bd. of Trustees, 147 N.H. 626, 629 (2002) ("Res judicata, or claim preclusion, bars the relitigation of any issue that was or might have been raised in respect to the subject matter of the prior litigation. In determining whether two actions are the same cause of action for the purpose of applying res judicata, we consider whether the alleged causes of action arise out of the same transaction or occurrence.") (citations and internal quotation marks omitted); Brzica, 147 N.H. at 455-56 ("Res

judicata will bar a second action even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action."); Radkay v. Confalone, 133 N.H. 294, 298 (1990) ("Generally, once a party has exercised the right to recover based upon a particular factual transaction, that party is barred from seeking further recovery, even though the type of remedy or theory of relief may be different.").

**Conclusion**

For the foregoing reasons, as well as those set forth in defendant's memorandum and its reply memorandum, defendant's motion to dismiss (document no. 11) is granted. The Clerk of Court shall enter judgment in accordance with this order and close the case.

**SO ORDERED.**

/s/_____
Steven J. McAuliffe
United States District Judge

October 12, 2004

cc: Duane J. Desiderio, Esq.
Sumner F. Kalman, Esq.
Michael A. Ricker, Esq.
John J. Ryan, Esq.

**APPENDIX E**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

| | | |
|---|---|---|
| Henry Torromeo and<br>MDR Corporation<br><br>Plaintiff(s)<br><br>v.<br><br>Town of Fremont<br><br>Defendant(s) | * | Civil No. 03-481-SM |

COMPLAINT FOR DEPRIVATION OF
CIVIL RIGHTS UNDER 42 U.S.C. § 1983

## I. NATURE OF THE ACTION

1. This is an action to recover damages under 42 U.S.C. § 1983 The Town of Fremont, New Hampshire, through its "Town Meeting" (the local legislative body) and Planning Board (collectively, "the Town"), has acted under color of state law and has made decisions resulting in the illegal restriction of the use and development of Plaintiffs'

respective parcels of land within the Town's jurisdiction. As a result of the Town's actions, it has taken Plaintiffs' property for public use without paying them just compensation (in violation of the Fifth and Fourteenth Amendments of the United States Constitution), and deprived Plaintiffs' Due Process and Equal Protection (in violation of the Fourteenth Amendment of the United States Constitution).

## II. PARTIES

2. Plaintiff Henry Torromeo is a New Hampshire resident and the owner of five (5) lots of a 27-lot subdivision known as "Mason's Corner." Torromeo previously owned and built homes on the subdivision's remaining 22 lots. The total acreage of the affected site for Mason's Corner comprises 97.4 acres.

3. Plaintiff MDR Corporation is a small, family-owned business incorporated in the State of New Hampshire, which is also its principal place of business. MDR owns a 14-lot subdivision known as "Glidden Hill Estates." The total acreage of the affected site for Glidden Hill Estates comprises 51 acres.

4. Defendant Town of Fremont (the "Town") is a municipal corporation of the State of New Hampshire. Within its borders, the Town, through its Town Meeting and Planning Board, is authorized to implement and administer the Town's planning and zoning laws, and to review and approve development plans for the subdivision of residential property. Moreover, the Town is permitted by statute to regulate the growth of development through the use of growth control ordinances, provided that such ordinances are supported by validly enacted Capital Improvement Programs ("CIP"). The Town applied a growth control ordinance, which is the subject of this Complaint, to Petitioners' respective development projects.

## III. JURISDICTION AND VENUE

5. This action arises under 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and § 1343 (original jurisdiction for Section 1983 actions). Plaintiffs have pursued, exhausted, and been denied, all available avenues for compensation provided by state law.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

## IV. FACTUAL ALLEGATIONS

### A. The Properties at Issue and Their Zoning Classifications

7. Plaintiff Torromeo's 97.4 acre property and Plaintiff MDR Corporation's 51 acre property are each zoned to allow residential development.

8. Plaintiff Torromeo's property for the Mason's Corner project was approved for subdivision by the Fremont Planning Board on February 5, 1997. The plan for Mason's Corner was recorded with the county and was eligible for building permits as of February 6, 1997.

9. Plaintiff MDR's property for the Glidden Hill Estates project was approved for subdivision by the Fremont Planning Board on August 18, 1999. The plan for Glidden Hill Estates was recorded with the county and was eligible for building permits as of August 19, 1999.

10. The Fremont Planning Board fully reviewed and approved both the Mason's Corner and Glidden Hill Estates projects to accommodate single-family homes.

### B. Fremont's Imposition of Growth Control Ordinance on Plaintiffs' Properties

11. In March of 1999, the Town of Fremont adopted a Growth Control Ordinance (the "Ordinance"), which gave the Fremont Planning Board authority to limit the number of building permits allocated for the construction of residential units in Fremont.

12. Acting on this authority, the Fremont Planning Board, on April 14, 1999, implemented "Growth Control and Permit Limitations," which restricted the number of building permits that would be issued to property owners during the year April 14, 1999, through April 13, 2000. Consequently, the Town of Fremont issued a maximum of 26 building permits for residential construction during the period April 14, 1999, through April 13, 2000. Once a permit was issued under the "Growth Control and Permit Limitations," builders had 30 days to commence construction or the permit would otherwise lapse.

13. Subsequent to the Ordinance's effective date, Plaintiff MDR applied for six (6) building permits to construct single-family homes at its site, Glidden Hill Estates. The Town applied the Ordinance to the Glidden Hill project, thereby issuing only five (5) permits and informing MDR that it would have to wait at least a year, until April, 2000, until additional permits for Glidden Hill could issue. After the Town only issued the five (5) permits for lots at Glidden Hill Estates, MDR nonetheless applied for permits on the remaining nine (9) lots to fully build-out the 14-lot subdivision. The Town denied these permits in reliance on the Ordinance.

14. Plaintiff Torromeo's project, Mason's Corner, was recorded and eligible for building permits more than two years before the Town adopted the Ordinance. The recordation of Mason's Corner prior to the Ordinance qualified the project as a vested subdivision under state law, and was therefore exempt from all

subsequent zoning changes for a period of four years. See New Hampshire Revised Statutes Annotated (RSA) 674:39.

15. In September 1999, Plaintiff Torromeo applied for building permits on the five (5) remaining lots for Mason's Corner. Although those lots were vested under New Hampshire law, the Town nonetheless applied the Ordinance to Torromeo's application and refused to issue the requested building permits because the Town had already issued the maximum number of permits allowed under the Ordinance for that year.

16. In addition to complying with all subdivision requirements, Plaintiffs Torromeo and MDR Corporation had built and paved necessary roadways, in compliance with prior Town and state approvals. Costs associated with the road building for Mason's Corner totaled approximately $225,000 for Torromeo. For Glidden Hill Estates, road building costs for MDR Corporation totaled approximately $775,000.

C. **Growth Control Ordinance Declared Invalid *Ab Initio* by New Hampshire Courts**

17. After having had their respective building permit applications denied, Plaintiffs each filed lawsuits against the Town for injunctive relief to compel permit issuance. The New Hampshire Superior Court granted the requested injunction in a decision dated December 27, 1999. Exhibit 1. The court ruled that the permits should have been issued because the Ordinance was invalid, *ab initio*, for failure to meet requirements established by the New Hampshire legislature. After an appeal by the Town, the New Hampshire Supreme Court, on June 26, 2000, summarily affirmed the Superior Court's decision that the Ordinance was invalid, *ab initio*. Exhibit 2.

18. The New Hampshire courts found the Ordinance illegal after determining that the Town never

enacted a valid Capital Improvements Plan ("CIP") in support of the Ordinance, a statutory prerequisite in New Hampshire for any growth control ordinance enacted by a municipality. See RSA 674:22. Additionally, the Town was required by statute to publish a "warrant article," or notice, informing the general public that the Planning Board would be preparing a CIP. See RSA 39:2. The Town never published such a warrant providing notice of the preparation of a CIP.

19. Without a valid CIP, the New Hampshire courts ruled that the Ordinance, the basis for which the Town denied Plaintiffs' their respective building permits, was "invalid, *ab initio*" and never should have been enforced.

20. Accordingly, the Town issued the nine remaining building permits to Plaintiff MDR for the Glidden Hill Estates project on June 26, 2000. The Town issued five building permits for Plaintiff Torromeo's vested lots for the Mason's Corner project in February, 2000.

D. **Plaintiffs File Takings Lawsuits in State Court for Just Compensation**

21. On March 21, 2000, Plaintiffs each filed actions in the Rockingham County Superior Court to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions. Although Plaintiffs were ultimately issued building permits, their takings claims were filed to obtain just compensation for the period during which the Town applied the illegal Ordinance to their respective properties.

22. At the commencement of the takings phase of the lawsuits, Plaintiffs MDR and Torromeo filed motions for summary judgment on the issue of liability. The New Hampshire Superior Court initially denied the motions on October 3, 2000. Exhibit 3. The Superior Court adopted

the Town's position that the Ordinance was "merely" defective procedurally for failure to adopt a CIP, and that unless the law itself was determined to be "unconstitutional," a taking would not arise.

23. Plaintiffs then filed a "Request for Ruling of Law," a procedure allowed under New Hampshire Superior Court Rule 141, allowing parties to request "interlocutory...order relative to proceedings preparatory for a hearing on the merits." In their Request for Ruling, the Plaintiffs asserted that the Town's refusal to issue building permits in reliance on the invalid, *ab initio* Ordinance was in and of itself an unconstitutional taking. On January 17, 2001, the Superior Court reversed itself, ruling that an award of damages *was* appropriate and that Plaintiffs need not prove that the Ordinance was "unconstitutional" to recover monetary relief. Exhibit 4.

24. The Town of Fremont then filed a motion for reconsideration in which it argued that the Superior Court's January 17, 2001, order was inconsistent with its previous ruling that denied liability on summary judgment. In an order dated March 19, 2001, the Superior Court formally joined the Torromeo and MDR takings actions and ruled that Plaintiffs were "entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance." Exhibit 5, p. 1. The Superior Court further held that "economic losses were compensable whether or not a 'taking' ha[d] occurred under existing case law." *Id.* pp. 3-4.

25. A trial on damages came next. On September 26, 2001, the Superior Court ruled that Plaintiff Torromeo was entitled to $23,800, which equaled the carrying costs and fair market value of his five unbuildable vested lots from August 26, 1999, through February 2000. Exhibit 6, p. 9. August 26, 1999 was the date that building

permits were no longer available under the invalid Ordinance. February 2000 was the date that building permits were again issued for Mason's Corner.

26. In the same September 26, 2001, opinion, the Superior Court also ordered compensation for Plaintiff MDR in the amount of $71,600, for the nine lots at MDR's Glidden Hill Estates subdivision. Exhibit 6, p. 9. These damages were calculated from the period August 26, 1999 through June 2000, the dates that building permits were blocked, then released, to MDR.

27. The Town appealed the Superior Court's decision. On December 13, 2002, the New Hampshire Supreme Court reversed, ruling that the Town was not liable to either of the Plaintiffs for damages. The New Hampshire Supreme Court's decision is reported at 813 A.2d 389 (N.H. 2002). The New Hampshire Supreme Court found as erroneous the Superior Court's failure to distinguish between an ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. Moreover, the New Hampshire Supreme Court ruled that just compensation is due only when a court "determin[es] that the ordinance is unconstitutional and constitutes a taking..." and that just compensation is *not* due for "an erroneous planning board decision based upon an otherwise valid regulation." 813 A.2d at 392. Finally, the Supreme Court held that judicial reversal of the erroneous action was the only available remedy. *Id.* at 392.

## CLAIMS FOR RELIEF

### Count 1: Taking in Violation of the Fifth and Fourteenth Amendments

28. Plaintiffs incorporate by reference each and every allegation set forth in ¶¶ 1 through 27 above.

29. The Fifth Amendment of the United States Constitution prohibits the government from taking private property for public use without the payment of just compensation. Through the Fourteenth Amendment, the requirements of the Fifth Amendment, including the Takings and Just Compensation Clauses, apply to the State of New Hampshire.

30. 42. U.S.C. § 1983 states that any person acting under color of state law who deprives any other person of rights secured by the United States Constitution shall be liable to the party seeking redress.

31. The application of the Town of Fremont's Growth Control Ordinance, which was *never* legal, to Plaintiffs' properties, failed to substantially advance any legitimate governmental interest, in violation of the Fifth and Fourteenth Amendments.

32. The application of the Town's Growth Control Ordinance, which was *never* legal, deprived Plaintiffs of the economic use of their respective properties, in violation of the Fifth and Fourteenth Amendments.

33. Accordingly, the Town must pay just compensation to the Plaintiffs for the respective takings of their properties.

Count 2: Deprivation of Due Process

34. Plaintiffs incorporate by reference each and every allegation set forth in ¶¶ 1 through 33 above.

35. The Fourteenth Amendment of the United States Constitution provides that no State shall deprive any person of their property without due process of law. The guarantee of due process demands that property owners have the right to be free from arbitrary, capricious, and unreasonable land use decisions of government regulators.

36. As a matter of law, Plaintiff Torromeo had a cognizable property interest subject to due process

protections because his recorded lots for the Mason's Corner subdivision were vested under New Hampshire statute, RSA 674:39. With regard to Plaintiff MDR Corporation, the only reason the remaining lots at Glidden Hill Estates were not vested was because the illegal Growth Control Ordinance was enacted after the lots' recordation.

37. The Town never should have applied the "invalid, *ab initio*" Ordinance to preclude issuance of the building permits to Plaintiffs' respective parcels. The denial of permits, to which Plaintiffs were entitled, constitutes a denial of due process. Application of the Ordinance, which was invalid from its inception and was not rationally related to a legitimate governmental interest, was an arbitrary and capricious action of the Town that denied Plaintiffs' due process.

Count 3: Denial of Equal Protection

38. Plaintiffs incorporate by reference each and every allegation set forth in ¶¶ 1 through 37 above.

39. The Fourteenth Amendment of the United States Constitution provides that no State shall deny any person within its jurisdiction the equal protection of the laws.

40. Plaintiff MDR Corporation received different treatment from other similarly situated property owners. It was treated disparately because it was unable to vest its lots for Glidden Hill Estates only because they were recorded after the Town enacted the illegal Ordinance.

41. Both Plaintiffs Torromeo and MDR Corporation received different treatment compared to other similarly situated property owners. They were treated disparately because they were not permitted to receive building permits solely by virtue of the Town's unreasonable application of the illegal Ordinance to their respective projects.

42. Accordingly, Plaintiffs were denied equal protection under the laws.

## PRAYER FOR RELIEF

Wherefore, Plaintiff Torromeo and Plaintiff MDR Corporation request that this Court:

(1) Find the Town liable for unconstitutionally taking Plaintiffs' respective properties without paying them just compensation;

(2) Order the Town to pay just compensation to Plaintiffs, with interest, from the date of each respective taking;

(3) Find the Town liable for depriving Plaintiffs due process and denying Plaintiffs equal protection;

(4) Order the Town to pay damages to plaintiffs under 42 U.S.C. § 1983;

(5) Order the Town of Fremont to pay Plaintiffs' attorneys' fees and costs;

(6) Order the Town of Fremont to award Plaintiffs other and further relief as this Court deems just and proper.

Date: November 5, 2003

Respectfully submitted,

*Sumner F. Kalman* #1303
Thea S. Valvanis #12214
147 Main Street, Box 988
Plaistow, NH 03865
(603) 382-4003

* * *

**APPENDIX F**

No. 02-1507

# In the Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
*Petitioners,*

v.

TOWN OF FREMONT,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. RYAN, ESQ.
*Counsel of Record*

CASASSA AND RYAN
459 LAFAYETTE ROAD
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(603) 926-6336

*Counsel for Respondent*

* * *

## TABLE OF CONTENTS

PAGE

RESTATEMENT OF QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

REQUEST TO DENY CERTIORARI ..... 1

COUNTER STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRIT ..... 3

I. Decision Below Does Not Present a Conflict ..... 3

II. No "Taking" Occurred ..... 6

III. The Decision Below Was Correct ..... 7

CONCLUSION ..... 7

* * *

* * *



Furthermore, the Petitioner's reliance on Nollan (Pet. at 13), is misplaced. Nollan involved a permit condition that required the landowner to dedicate land to the public, and it holds only that such compelled dedications warrant careful scrutiny because they present a heightened risk that the government might be sidestepping its constitutional obligation to acquire land upon the payment of just compensation. Nollan provides no support for Petitioners' argument that a permit denial under a procedurally defective land use ordinance engenders an automatic takings clause.

Finally, the Petitioner's reliance on Penn Central Transp. Co. v. City of New York, U.S. 104 (1978), is misplaced. The Petitioners fail to cite the Penn Central case or its holding in its New Hampshire Supreme Court proceedings; therefore any argument based on that case has been waived and is not properly before this Court. In addition the Petitioners fail to cite a single case from the U.S. Supreme Court or any other Court in which the kind of procedural defect found in this case was given any significant weight in takings analysis under Penn Central's "character of government action" prong or test.

* * *

**APPENDIX G**

# THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2001-612

HENRY TORROMEO

v.

TOWN OF FREMONT

MDR CORPORATION

v.

TOWN OF FREMONT

Argued: July 11, 2002

Opinion Issued: December 13, 2002

Sumner F. Kalman, Attorney at Law, P.C., of Plaistow (Sumner F. Kalman on the brief and orally), for the plaintiffs.

Casassa and Ryan, of Hampton (John J. Ryan on the brief and orally), for the defendant.

Susan Slack, of Concord, by brief, for the New Hampshire Municipal Association, as amicus curiae.

NADEAU, J. The defendant, the Town of Fremont (town), appeals orders of the Superior Court (McHugh and Abramson, JJ.), holding the town liable to the plaintiffs, Henry Torromeo and MDR Corporation (MDR), for damages caused by the town's denial of building permits pursuant to an invalid growth control ordinance. We reverse.

The trial court found, or the record discloses, the following facts. Torromeo is the developer of Mason's Corner, a twenty-seven lot residential subdivision in Fremont. The subdivision plan was approved by the town planning board and recorded in the Rockingham County Registry of Deeds in February 1997. In August 1999, when five lots in the subdivision remained unsold, the town stopped issuing building permits pursuant to its growth control ordinance. Torromeo and a prospective purchaser sued the town, seeking to require it to issue a building permit to the buyer. The Trial Court (Galway, J.) determined that the subdivision was exempt from the growth control ordinance under RSA 674:39, which provides, in part, that an approved and properly-recorded plat or site plan is exempt from subsequent zoning ordinance changes, except those expressly protecting public health standards, for four years from the date of recording. See RSA 674:39 (1996). The court enjoined the town from refusing to issue the requested permit.

MDR is the developer of Glidden Hill Estates, a fourteen lot subdivision in Fremont. MDR was issued five building permits, but was informed by the town that under the growth control ordinance, no more permits would be issued until April 2000. MDR sued the town, challenging the growth control ordinance. MDR argued that the ordinance was invalid because the town never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance, see RSA 674:22 (1996). The Trial Court (Murphy, J.) agreed, ruling, among other things, that because the subject of the motion made at the 1987 town meeting regarding a CIP was not stated in the warrant, the motion was invalid. The court therefore ruled that a valid CIP was never

adopted and that the growth control ordinance was invalid ab initio. We summarily affirmed that decision on June 26, 2000. See MDR Corporation v. Town of Fremont, No. 2000-100 (N.H. June 26, 2000).

Following the dispositions of their respective cases in superior court, the plaintiffs filed separate actions against the town for damages caused by the temporary taking of their property from the time building permits were denied under the growth control ordinance until they were finally issued. Each plaintiff filed a motion for summary judgment on the issue of liability, arguing, among other things, that the town's liability was established by the prior decision in the MDR case that the growth control ordinance was invalid ab initio. The town objected, arguing that the plaintiffs had to show that the ordinance was unconstitutional, not merely invalid or unenforceable. The Trial Court (McHugh, J.) denied the motions.

MDR then filed a request for a ruling of law that the decision declaring the ordinance invalid ab initio also rendered it "unconstitutional per se," making it unnecessary to further prove that the ordinance was arbitrary or unreasonable. The trial court ruled:

> As this Court understands the dispute, the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages, but those damages would be limited to economic losses due to its inability to build homes for the period of time that the Town refused to grant building permits.

The court ruled that MDR would have to prove unconstitutionality, however, in order to recover attorney's fees.

The town filed a motion for reconsideration, which the court addressed in an order dated March 19, 2001. In that order, the court joined the MDR and Torromeo cases by consent of the parties. It then sought to clarify its prior rulings on the takings issue, noting in hindsight that it should have granted the plaintiffs' motions for summary judgment on the issue of liability. It concluded:

> Call it what you will, this Court finds and rules that the plaintiff [sic] in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a "taking" occurred under existing case law.

A trial was held on the issue of damages and the Trial Court (Abramson, J.) awarded the plaintiffs the carrying costs and fair rental value on their unsold lots during the time the growth control ordinance prevented them from obtaining building permits. The town now appeals, contending that the trial court erred in ruling: (1) that the plaintiffs did not have to prove the unconstitutionality of the growth control ordinance in order to recover for a taking; and (2) that the plaintiffs could recover damages for loss of economic use of their property based solely upon the finding in the previous MDR case that the ordinance was invalid due to a procedural error.

"We will uphold the decision of the trial court unless it is unsupported by the evidence or is legally erroneous." Smith v. Town of Wolfeboro, 136 N.H. 337, 342 (1992). The town argues that the trial court erred in failing to distinguish between an ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. We agree.

The ruling in the first MDR case, which the plaintiffs claim establishes liability for damages, did not find the growth control ordinance unconstitutional, but rather void due to a procedural defect. The trial court stated as much in its order on MDR's request for ruling of law: "Declaring that the Ordinance cannot be applied to the plaintiff because it was not procedurally enacted correctly does not mean the Ordinance is substantively unconstitutional." In ruling that the plaintiffs could nevertheless recover damages, however, the trial court erred.

We have held that "arbitrary or unreasonable [zoning ordinance] restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking, within the meaning of our New Hampshire Constitution requiring the payment of just compensation." Burrows v. City of Keene, 121 N.H. 590, 598 (1981) (quotation omitted). We have, however, rejected claims for damages in zoning ordinance challenges in which it was determined that no taking or inverse condemnation occurred, see Soares v. Town of Atkinson, 129 N.H. 313, 317 (1987), or where the constitutionality of the regulation was not challenged, see Smith, 136 N.H. at 345. We have also distinguished an erroneous planning board decision based upon an otherwise valid regulation from "the application of an invalid regulation," and held that the former does not constitute a

compensable taking even though it may subject the property owner to a loss of value. Id. at 346; see also Dumont v. Town of Wolfeboro, 137 N.H. 1, 10 (1993). Rather, the owner's only remedy is reversal of the erroneous decision on appeal. See Smith, 136 N.H. at 346; Dumont, 137 N.H. at 10.

The plaintiffs argue that because the growth control ordinance was found to be invalid ab initio, this is a case of "the application of an invalid regulation" as discussed in Smith. We disagree. The context in which that term is used in Smith indicates that by "invalid regulation," we meant an unconstitutional one:

> An erroneous planning board decision based on sound authority must be distinguished from the application of an invalid regulation. An appeal of a mistaken board decision is an element of the governmental decision making process under RSA 677:15 (amended 1991). A declaration that an ordinance is unconstitutional is an extraordinary measure, designed to rectify a conclusory act of rule making that stripped a property owner of his or her rights.

Smith, 136 N.H. at 346.

Absent a determination that the ordinance is unconstitutional and constitutes a taking, this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy. "Judicial, quasi-judicial, legislative or quasi-legislative acts of a town ordinarily do not subject it to claims for damages." Marino v. Goss, 120 N.H. 511, 514 (1980). Accordingly, we hold that the plaintiffs are not entitled to

damages, and that their only remedy is issuance of the erroneously-denied building permits.

Reversed.

BROCK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

**APPENDIX H**

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

**OCTOBER SESSION**

NO.

**MDR CORPORATION**
**&**
**HENRY TORROMEO**

**VS.**

**TOWN OF FREMONT**

## NOTICE OF APPEAL

CASASSA & RYAN
459 Lafayette Road
Hampton, New Hampshire
By:
**John J. Ryan, Esquire**

* * *

**CASE TITLE (Full Name)**
**MDR Corporation v. Town of Fremont**
and
**Henry Torromeo v. Town of Fremont**

**APPEAL FROM:**

Date of:
(a) Clerk's Notice: 9/26/01
(b) Sentencing (criminal):
(c) Probate Court filing:
Trial Judge; Master; Other:
Kenneth R. McHugh and Gillian L. Abramson
Court Reporter or Machine Operator: Catherine Handel
Docket No. below:
00-C-0256 and 00-C-0257
Trial counsel below:
**For Plaintiff: Sumner Kalman, Esq.**
**For Defendant: John J. Ryan, Esq.**

Which side is the moving party:
Defendant

* * *

* * *

**BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:**

These cases arose out of an earlier case, MDR Corporation v. Town of Fremont, 99-E0444, decided 12/17/99, Appendix at pp. 16-19 (appeal declined by Order of this Court dated June 26, 2000, Appendix at pg. 52)

In that case the Lower Court held that at its annual Town Meeting in 1987, the vote taken at that meeting did not properly authorize the Planning Board of Fremont to prepare a Capital Improvement Program, under RSA 674:5. The Court then held that the statutory requirement under RSA 674:22 requiring a Capital Improvement program as a basis for a growth control ordinance had not been met despite the actual existence of

capital improvement programs since 1987, and invalidated the Town's 1999 Growth Control Ordinance.

On March 21, 2000, the Plaintiffs in these cases brought actions for damages claiming inverse condemnation temporary loss of the use of the property during the period of April 1999 to the above date of June 26, 2000. See Appendix at pp. 1-9 and 86-97.

On August 24th and 25th, 2000 the Plaintiffs filed Motions for Summary Judgment on the issue of liability (Appendix at pp. 10-21 and 98-116) seeking an order that by reason of the decision in the first MDR case the Defendant was liable for inverse condemnation damages as a matter of law.

The Defendant responded with appropriate objections. Appendix at pp. 22-60 and 117-157.

On 10/3/2000 the Lower Court denied both Motions for Summary Judgment. Appendix at pg. 61 and 158.

In January 2001, the Plaintiff MDR filed a "Request for Ruling of Law", et al again seeking a determination that the Court rule that by reason of the 12/27/99 Order the 1999 Growth Control Ordinance was unconstitutional per se, Appendix at pp. 62-72. The Defendant objected to that Motion, Appendix at pp. 73-75. On January 21, 2001 the Lower Court issued its Order on Plaintiffs' Request for Ruling of Law. Appendix at pp. 76-78. In that Order the Lower Court held that the Plaintiff was not required to prove that the Ordinance was unconstitutional and that the 12/27/99 Order declaring the Ordinance procedurally defective was sufficient for Plaintiff to proceed to a determination of damages. The Defendant seasonably filed its Motion for Reconsideration. Appendix at pp. 79-82.

On March 21, 2001, the Lower Court issued its "Order". Appendix at pp. 159-165. In that Order the Lower Court consolidated the two cases, clarified its previous Order of January 17, 2001 and allowed the Plaintiffs to proceed to a

hearing on damages, while also preserving the Defendants right to contest the Court's findings regarding liability.

On June 27, 2001, the "damage" portion of the case was heard. On September 26, 2001, the Lower Court issued its decision awarding the Plaintiff MDR, the sum of $71,600 and awarding the Plaintiff Torromeo the sum of $23,800. Appendix at pp. 165-177. The Lower Court again noted the Defendant's ability to appeal the issue of liability.

The Defendant has filed its Motion for Reconsideration of Finding with regard to one factual issue. Appendix at pp. 178-180. A ruling was issued on 10/15/01. Appendix at pp. 182-183.

The Defendant hereby appeals the findings and rulings of the Lower Court regarding the issue of whether the Defendant can be liable for inverse condemnation temporary taking damages for loss of the use of property where there was no finding that the 1999 Growth Control Ordinance was unconstitutional.

**STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:**

Decision of Rockingham County Superior Court dated 12/27/00 MDR Corporation v. Town of Fremont, 99-E-0444. Appendix at pp. 16-19.

(Deemed by Lower court in instant cases as the "law of the case"). See Appendix at pg. 177.

**SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(2). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).**

The Lower Court found that the defect in the 1999 Growth Control Ordinance enactment process was rooted in a 1987 procedural error. The Lower Court also found that the Town was not guilty of bad faith, and that the Plaintiffs were not entitled to attorneys fees. The Lower Court did not find that the 1999 Growth Control Ordinance itself was unreasonable, arbitrary or irrational and did not find that the Ordinance bore no substantial relationship to the health, safety, morals or welfare of the Town, or that the Ordinance was unconstitutional.

In light of the above, the issues raised in this Appeal are as follows:

1. Was the Lower Court in error in its ruling that the Plaintiff were not required to prove that the 1999 Growth Control Ordinance was unconstitutional in order to recover inverse condemnation "taking" damages for temporary loss of economic use of property.

2. Was the Lower Court in error in ruling that the Plaintiffs were entitled to claim temporary loss of economic use of property damages solely on the basis of the Court's holdings in the first MDR case that the Ordinance was invalid by reason of a procedural defect.

**WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:**

**(A) The proper standard of review to be applied by the court to the question, citing relevant authority;**

**(B) The parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and**

**(C) The case(s) most relied upon to support the moving party's position:**

**Question #1.**

A. Whether the Lower Court's rulings are erroneous as a matter of law. Unit Owners Association of Sumit Vista Lot 8 Condominium v. Miller, 141 NH 39 (1996)

Legal conclusions are reviewed independently for plain error Olbres v. Hampton Cooperative Bank, 142 NH 227 (1997).

B. Adequate written substitute could be provided in place of a transcript.

C. Burroughs [sic] v. Keene, 121 NH 590 (1981). Plaintiffs must prove unconstitutional abuse of power as a pre-requisite to a claim for "taking" damages, such as alleged by the Plaintiffs, and awarded under Lower Court Order of 9/26/01. Appendix at pp. 165-177.

Busky v. Town of Hanover, 133 NH 318 (1990). Under New Hampshire constitutional law, Ordinances will not be declared unconstitutional unless Plaintiff proves that the Ordinance provisions themselves are arbitrary and unreasonable and have no relation to the health, safety, morals or general welfare of the community.

Opinion of the Justices, 117 NH 749 (1977). Laws affecting economic interests which are directed to fulfilling the public interest or general welfare are constitutional unless wholly irrational.

**Question #2**

A. Whether the Lower Court's rulings are erroneous as a matter of law. Unit Owners Association of Sumit Vista Lot 8 Condominium v. Miller, 141 NH 39 (1996).

Legal conclusions are reviewed independently for plain error Olbres v. Hampton Cooperative Bank, 142 NH 227 (1997).

B. Adequate written substitute could be provided in place of a transcript.

C. Dugas v. Conway, 125 NH 175 (1984). Ordinances must be found to violate Part I Article 12 of the New Hampshire Constitution in order to constitute a taking such as alleged by the Plaintiffs, and awarded under Lower Court Order of 9/26/01. Appendix at pp. 165-177. Mere procedural error is not sufficient to establish unconstitutional taking. Finding of unconstitutionality required in takings cases.

* * *

**A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:**

The New Hampshire Supreme Court has never held that inverse condemnation damages can be recovered in land use cases absent a finding that the Ordinance or Regulation in question is unconstitutional. The Lower Court's rulings that a finding of unconstitutionality is not a prerequisite to takings cases is contrary to established New Hampshire precedent.

The Town of Fremont has been subjected to a Court Order requiring it to pay $95,400 in takings damages solely on the basis of a 1987 procedural defect in its capital improvement enactment Warrant Article vote.

Acceptance of this Appeal will protect the Town from the substantial and irreparable injury of liability to the Plaintiffs for the above amount.

This Appeal is of great importance to all municipalities in New Hampshire. Unless this Appeal is accepted, all towns and cities in the State will be subject to a claim for inverse condemnation damages where any procedural irregularity exists in the enactment of any land use ordinance or regulation.

* * *

**CERTIFICATIONS**

1. I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

/s/_____
Counsel

2. I hereby certify that copies of this notice of appeal have been served on all parties to the case and have been filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

/s/_____
Moving Party or Counsel

**APPENDIX I**

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Henry Torromeo
v.
Town of Fremont

00-C-0256

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MDR Corporation

v.
Town of Fremont

00-C-0257

ORDER

In these consolidated cases, plaintiffs seek monetary damages for lost development and real estate profit suffered after the Town of Fremont imposed and maintained an invalid interim growth control ordinance in March 1999.

In December 2000, the Court (Murphy, J.) ruled that the Town's original growth control ordinance was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. See MDR Corp. v. Town of Fremont, Rockingham Co. Super. Ct. No. 99-E-644. Notwithstanding this Court order, the Town continued to implement its ordinance and refused to issue building permits to both plaintiffs in these cases, which would have allowed them to build residential homes on pre-approved

subdivision lots for prospective buyers. These lawsuits followed.

On March 19, 2001, the Court (McHugh, J.) granted plaintiffs' Motions for Summary Judgment on Liability, finding that plaintiffs were entitled to recover damages for their economic loss as a matter of law because defendants continued to impose their invalid ordinance preventing development. The Court ruled that the economic losses were compensable whether or not a "taking" occurred under existing case law and scheduled an evidentiary hearing on the issue of plaintiffs' economic damages. From the testimony and exhibits presented at the evidentiary hearing, the Court finds and rules as follows:

Plaintiffs are developers of two residential subdivisions in the Town of Fremont. Henry Torromeo and his company, Torromeo Industries (collectively "Torromeo"), developed the Mason's Corner Subdivision, which consists of 27 lots for single family homes. The Fremont Planning Board approved this subdivision for development. Torromeo then filed the approved plan in the Rockingham County Registry of Deeds in February 1997. Torromeo bought this subdivision and acquired its development rights in August 1998.

In January 1999, Torromeo bonded the subdivision project with the Town and began selling lots to builders. The builders then found buyers for the lots, obtained building permits, and began building on each lot in January 1999. By March 1999, when the Town imposed the permanent growth control ordinance, Torromeo had sold 11 out of 27 subdivision lots, to three different builders. However, the Town revoked previously issued building permits on at least two of these lots for the builders' failure

to complete substantial construction. This revocation of permits and new substantial construction policy for retention of building permits, caused builders to be wary of purchasing lots in the subdivision. The asserted reasoning for this decline was that builders would not buy lots that they could not develop according to their own timelines, or, develop at all. Sales continued to gradually decline, and by August 1999 five lots remained unsold. By August 26, 1999, the Town refused to issue further building permits, because its growth control ordinance prohibited their issuance and its maximum capacity for permits had been reached. With no permits available, Torromeo was unable to sell any of the five remaining lots until February 2000, when building permits again were issued.

Torromeo now seeks damages consisting of the fair rental value of his lots from March 1999, when the invalid ordinance took effect, through February 2000, when his remaining lots sold. He additionally seeks carrying costs for each of the five lots, which consist of property taxes, fees to extend letters of credit, insurance costs, accounting costs, and opportunity costs.

Torromeo's project manager and cousin, Vincent Iacozzi, also seeks damages in this action. He asserts that Torromeo promised to sell him Lot #9 in the subdivision, at an extremely discounted rate, and that this lot would be available in May 1999. In reliance, Mr. Iacozzi applied for a building permit for Lot #9 and placed his own home on the market, expecting that the building permit would be issued. Subsequently Mr. Iacozzi's home sold, but the Town denied his building permit. This caused Mr. Iacozzi to incur alleged damages for storing his possessions and renting a home from December 1999 until August 2000, when his home in Mason's Corner was finally completed.

The evidence shows that Mr. Iacozzi did not take title to Lot #9 until June 2001, and that he knew of the problems with the growth control ordinance throughout his tenure as project manager for Torromeo Industries. Moreover, the evidence shows that Mr. Iacozzi did not purchase the lot for fair market value, and, he has never intervened as a party in this case. Finally, Mr. Iacozzi has not alleged any actions by the Town that prevented him from purchasing a lot for fair market value and obtaining a building permit elsewhere. Accordingly, the Court rules that Mr. Iacozzi's alleged damages are too speculative and too tenuously connected to this case to be determined by the Court.

MDR Corporation, in contrast, was developing a subdivision in Fremont designated as Glidden Hill Estates. The subdivision plan for Glidden Hill Estates consisted of 14 lots for single family homes. The Fremont Planning Board approved this subdivision plan in May 1999. MDR subsequently recorded the plan in the Rockingham County Registry of Deeds in August 1999. After planning board approval but prior to recordation, MDR obtained bonding of the project with the Town, built and paved roads within the subdivision, and began marketing the lots for sale to builders. MDR then applied for, and was granted, five building permits. However, the Town then informed MDR that no further permits would be issued until April 2000 due to the growth control ordinance.

The growth control ordinance ultimately prevented MDR from selling the remaining nine lots in its subdivision for almost one year. Again, the bar to selling the lots was that builders would not buy land on which they could not build. MDR subsequently brought suit in this Court to enjoin the Town from enforcing this ordinance and to

declare the ordinance unconstitutional. This suit led to the above-referenced ruling, that the ordinance was invalid ab initio, for failure to comply with statutory requirements for its imposition. MDR Corp. v. Town of Fremont, Rockingham Co. Super. Ct. No. 99-E-644 (Murphy, J.) (decided December 2000). MDR ultimately received building permits and sold its nine remaining lots by sometime in June 2000. MDR now seeks the fair rental value of its nine lots from August 1999 through June 2000, as well as the same carrying costs itemized by Torromeo above.

The Court finds and rules that both Torromeo and MDR are entitled to recover damages beginning on August 26, 1999, the date that building permits were no longer available under the invalid growth control ordinance. Contrary to plaintiffs' position, the Court finds that the existence of an invalid growth control ordinance itself does not cause damage. Damage occurs only when the growth control ordinance actually prohibits plaintiffs from receiving building permits. Here, the undisputed testimony shows the damage began on August 26, 1999. Because the building permits were no longer available as of this date, the properties were unmarketable to builders and plaintiffs then suffered damage. See Prudhomme v. Flanagan, [sic] 138 N.H. 561, 575 (1994) (finding that damage occurs only when plaintiff can take no further action to improve its own position). Accordingly, the Court rules that Torromeo is entitled to the carrying costs and fair rental value for his five lots from August, 26, 1999 through February 2000 (six months) and MDR is entitled to the same damages for its nine lots from August 26, 1999 through June 2000 (ten months).

MDR and Torromeo retained Joseph G. Fremeau, MAI, and Fremeau Appraisal, Inc., to provide the Court with an expert assessment of their damages. Mr. Fremeau presented the Court with an expert appraisal of plaintiffs' properties, calculating a fair rental value for each lot involved and itemizing all relevant carrying costs. The Town, in turn, retained John M. Crafts, MAI, and Crafts Appraisal Associates, Ltd., to provide the Court with an alternative analysis of plaintiffs' damages.

Mr. Crafts reviewed the Fremeau report and used substantially the same methodology as Mr. Fremeau in arriving at his own appraisal. The only differences in the two appraisal reports are the appropriate market rental rate of return for single family homes and the appropriate time period for which rental value should be calculated. The Court finds that Mr. Crafts agrees with Mr. Fremeau, by not presenting contrary data, on both the market values for the MDR properties and the carrying costs of each plaintiffs' properties. The Court previously ruled above on the appropriate time period for damages sustained by each plaintiff, finding that the rental period would begin for each plaintiff on August 26, 1999. Accordingly, the only remaining issue in dispute is the appropriate rental value of the properties.

Both experts agreed that the proper method of valuation for the undeveloped subdivision lots was the income capitalization approach based upon the lots' fair market rental value. See In re City of Nashua, 138 N.H. 261, 265 (1998). They arrived at this determination due to the temporary nature of plaintiffs' damages. The experts further agreed that single family building lots are not typically rented on the open market. Thus, comparable rentals were unavailable for comparison in their damage analysis. Accordingly, the experts agreed that the

appropriate market rental value must be calculated by applying the appropriate rate of return to the actual fair market value of the property.

The parties agree that the fair market value of MDR's nine Glidden Hills Estates subdivision lots was $660,000. Accordingly, the Court will not disturb this valuation. However, Mr. Fremeau found the value of Torromeo's five Mason's Corner subdivision lots to be $250,000, while Mr. Crafts found their value to be $230,000. Mr. Crafts' estimation of fair market value is derived from the actual sales prices of the five Mason's Corner lots in February 2000. In contrast, Mr. Fremeau's estimation of their fair market value came from comparable sales of similar lots at $50,000 per lot. The Court finds that Mr. Crafts' appraisal is based upon actual market data and that Mr. Fremeau's opinion that one lot sold at less than fair market value is not supported by raw data. Because the expert appraisal values are close in number, the Court presumes that the sale price of the fifth lot is a reasonable estimation of its fair market value, and it is documented with raw data. Accordingly, the Court adopts Mr. Crafts' $230,000 fair market value estimate for the Mason's Corner lots.

However, the Court adopts Mr. Fremeau's 12% market rate of return, to be applied to these values in determining appropriate market rent. Mr. Fremeau clearly and credibly explained his calculation of this percentage, which was substantiated upon real data in the commercial market. Mr. Fremeau looked to the average rate of return for retail and restaurant sites in the surrounding area, and found that the average rate of return for commercial property hovered somewhere around 10%. Specifically, he compared fast food establishments to gas stations in the surrounding area. Mr. Fremeau then looked to the rate of

return on low-risk CD's and Treasury Bills, and learned that this rate hovered around 7%. He further determined that home and commercial mortgage rates in the Fremont area hovered around 9.5%; higher risk stocks received a rate of return greater than 12%; and the Standard and Poor's (S&P) Index had increased more than 12% between mid 1999 and mid 2000. Based upon these averages, and the booming New Hampshire real estate market, Mr. Fremeau determined that a residential lot would receive a slightly higher rate of return, due to its slightly higher market risk on the rental market than would commercial property. Thus, he added two percent to the average commercial rate of return, which also was consistent with the 12% increase in the S&P annual index.

In contrast, Mr. Crafts found that a 7.5% rate of return was more appropriate for the subdivision lots at issue. Mr. Crafts looked to the Town of Fremont bond rating, the commercial lending rate for the Town of Fremont, and additional tax exempt issues within the Town. Mr. Crafts then multiplied these numbers by a 30% tax factor and arrived at an after-tax rate of approximately 5%. Recognizing that the undeveloped lots under an approved subdivision plan would require some sort of management and upkeep, Mr. Crafts then added 2.5% to the 5% rate to arrive at his final rate of return.

The Court finds Mr. Fremeau's analysis of rates of return to be much more clear, credible, concise, and substantiated upon, real data in the commercial real estate market. Further, Mr. Fremeau's analysis comports with a reasonable person's estimation in a real estate transaction during a booming real estate market. The Court finds that Mr. Crafts' analysis is not premised upon any form of

comparable rates of returns and is far too speculative to be adopted. Accordingly, the Court adopts Mr. Fremeau's application of 12% as the appropriate rate of return to apply to the fair market values of the fourteen lots.

Applying this rate of return to the fair market value, the experts testified that the resulting number must be divided by twelve to arrive at a monthly rental rate. Then, this monthly rate is multiplied by the number of months that each plaintiff is entitled to receive a fair rental value. Under this analysis and the rulings enumerated above, the following charts summarize the expert appraisals and the Court's award consistent with the above findings and rulings:

| | MDR PROPS. Rental Value | TORROMEO PRPS Rental Value | MDR - Costs | TORROMEO Costs |
|---|---|---|---|---|
| FREMEAU APPRAISAL | $660,000*.12<br>=$79,200/12mo<br>$6,600*10mo<br>=$66,000 FRV | $250,000*.12<br>=$30,000/12mo<br>=$2,500*6mo<br>=$15,000 FRV | $5,600 | $10,000 |
| CRAFTS APPRAISAL | $660,000*.075<br>=$49,500/12mo<br>=$4,125*10mo<br>=$41,250 FRV | $230,000*.075<br>=$17,250/12mo<br>=$1,438*6mo<br>=$8,628 FRV | $5,600 | $10,000 |
| COURT ORDER | $660,000*.12<br>=$79,200/12mo<br>=$6,600*10mo<br>**=$66,000 FRV** | $230,000*.12<br>=$27,600/12mo<br>=$2,300*6mo<br>**=$13,800 FRV** | **$5,600**<br>UNDIS-PUTED | **$10,000**<br>UNDIS-PUTED |

For the reasons stated, and based upon the above calculations, the Town is ORDERED to pay Mr. Torromeo $23,800.00 as the appropriate fair rental value and carrying costs for his five unbuildable lots. The Town is further ORDERED to pay MDR Corporation $71,600.00 as its appropriate fair rental value and carrying costs for its nine unbuildable lots. These damages are appropriate based upon the Town's continued imposition of its invalid growth ordinance, which prevented plaintiffs from selling or developing their remaining lots.

Each party has submitted requests for findings of fact and rulings of law. In light of the narrative discussion above, the Court rules upon plaintiff's requests for findings of fact and rulings of law on the Mason's Corner Subdivision as follows:

GRANTED: 1-14; 19-22;

DENIED: 15-18; 24-25 (see decision);

NEITHER GRANTED NOR DENIED: 23 (see decision).

The Court rules upon plaintiff's requests for findings of fact and rulings of law on the Glidden Hill Subdivision as follows:

GRANTED: 1-13; 17-20;

DENIED: 14-16;

NEITHER GRANTED NOR DENIED: 21-22 (see decision).

The Court rules on the Town's requests for findings of fact and rulings of law as follows:

GRANTED: 3-7; 10; 12-13; 21; 26-27; 30;

DENIED: 1-2 (see Order March 19, 2001 (McHugh, J.)); 8; 9 (see decision); 17-20; 28-29; 31-34;

NEITHER GRANTED NOR DENIED: 14-16 (see decision); 22-25 (see decision and Order (Murphy, J.) in 99-E-644).

The Court rules on the Town's requests for relief as follows:

GRANTED: B;

DENIED: C-G;

NEITHER GRANTED NOR DENIED: A. (The Court will not reverse the prior ruling of law relating to liability in this case. Judge McHugh revisited this issue three times and thoroughly explained his ruling. This ruling is the law governing this case which the Town may appeal at the conclusion of this litigation) (See Order (McHugh, J.) (dated March 19, 2001)).

So ORDERED.

DATE: September 26, 2001

/s/ Gillian Abramson
GILLIAN L. ABRAMSON
Presiding Justice

**APPENDIX J**

THE STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS. SUPERIOR COURT

00-C-257
MDR Corporation

v.

Town of Fremont

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00-C-256
Henry Torromeo

v.

Town of Fremont

---

ORDER

The purpose of the within Order is to clarify the issues in these related cases. Although these two cases have never been formally joined, the Court now does so by consent of the parties. Counsel now agree that because the issues raised in these two lawsuits are identical and because the lawyers are the same as well as the witnesses, these cases should be tried together.

Both of these lawsuits were brought as a direct result of a ruling made in case number 99-E-444, MDR Corporation v. Town of Fremont. In that case the Court (Murphy J.) found and ruled that the defendant's Growth Control Ordinance enacted in March of 1987 was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. Thus because of a procedural defect in the

enactment of the Ordinance, it had no validity. Notwithstanding that fact, the Town implemented the Ordinance and refused both plaintiffs in these cases building permits to enable them to construct residential homes for their perspective buyers.

Both plaintiffs have brought lawsuits seeking monetary compensation for the lost profits that they have suffered as a result of the defendant's implementation of its invalid Growth Control Ordinance. Shortly after the lawsuits were brought, both plaintiffs filed Motions for Summary Judgment on the issue of liability. They argued that because Judge Murphy's determination that the Growth Control Ordinance was invalid, said determination having been affirmed on appeal to our Supreme Court, there were no disputed issues regarding liability. In the defendant's objection to both Motions for Summary Judgment, it took the position that merely because the Growth Control Ordinance was defective procedurally did not mean that it was substantively unconstitutional. The defendant argued that unless a finding was made that the ordinance was substantively unconstitutional then the plaintiffs were not entitled to any monetary damages.

By order dated October 3, 2000, this Court denied both plaintiffs' Motions for Summary Judgment on liability. It accepted the defendant's argument that the question of whether or not the ordinance was substantively unconstitutional was still an open question because Judge Murphy's Order did not address it.

Upon receipt of this Court's Order denying the Motion for Summary Judgment, the plaintiff in 00-C-257 filed a Request for Ruling of Law. In that pleading the plaintiff suggested that the fundamental question to be

addressed is not whether the ordinance was substantively unconstitutional, but rather whether the defendants refusal to issue building permits based upon the procedurally invalid Growth Control Ordinance constituted a "taking" of the plaintiff's property as that term is defined under case law. The plaintiff suggested that under case law such a taking did occur for which it was entitled to monetary damages.

By Order dated January 17, 2001, this Court in part agreed with the plaintiff's position. It ruled that "the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages but those damages would be limited to economic losses due to its inability to build homes in the period of time that the Town refused to grant building permits". However the Court in effect imposed a higher standard on the plaintiff if it sought to recover other damages in addition to economic loss such as attorney fees.

Upon receipt of the Court's January 17, 2001 Order, the defendant filed a Motion for Reconsideration. In the motion the defendant argued that the substance of the Court's October 5, 2000 denial of the plaintiff's Motion for Summary Judgment on liability and its Order of January 17, 2001, could not be reconciled. While the Court does not agree with the defendant's interpretation of its two prior Orders, it does agree that some clarification is necessary.

The parties have a dispute as to whether or not a legal "taking" has occurred with respect to the defendant's implementation of it [sic] what has been determined to be its invalid Growth Control Ordinance back in 1987. The plaintiff argues that under case law a "taking" did occur; the

defendant argues that under the same case law no "taking" resulted.

In the Court's mind, the issue transcends what constitutes a legal "taking". The defendant concedes that for a period of time it refused to allow either of these plaintiffs to obtain building permits based upon what has later been found to be an invalid implementation of its Growth Control Ordinance. Call it what you will, this Court finds and rules that the plaintiff in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a "taking" occurred under existing case law. It is unconscionable for a municipality to take the position that no damages should be paid when its ordinance restricting building has been determined to be invalid and when the implementation of that Ordinance resulted in provable monetary losses to the plaintiffs.

In retrospect the Court determines that the plaintiffs' Motions for Summary Judgment on liability should have been granted when they were initially filed. Under the within ruling the plaintiffs shall be permitted to place evidence before the Court on their respective claims for economic loss without addressing at all the issue of liability. The plaintiffs do not allege that the defendant is guilty of bad faith in the implementation of its Growth Control Ordinance, however bad faith does not have to be proven if the damages sought are limited to economic loss.

Because of the potential for confusion as a result of this Court's past Orders it determines that the defendant's objection to its findings of liability as a matter of law is

timely made and shall be ripe for appeal at the conclusion of the damage phase of this litigation.

Both of these cases have been scheduled for a bench trial with 00-C-257 scheduled on March 28, 2001 and 00-C-256 scheduled on May 1, 2001. Both of those scheduled trials are continued because counsel agree that the cases can be heard together. This Court stands ready to try these cases in either May or June. The Court will be presiding in Belknap County for the month of July and August thus counsel are requested to review their respective calendars for the month of May and June and select a date certain for the one-day trial of these cases and notify the Court within the next ten days.

So ORDERED.

DATE: March 19, 2001

/s/ Kenneth McHugh
Kenneth R. McHugh
Presiding Justice

**APPENDIX K**

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2000-100, MDR Corporation v. Town of Fremont, the court upon June 26, 2000, made the following order:

The court having reviewed the notice of appeal and appendix, the decision below is summarily affirmed in accordance with Rule 25(1)(b) on the basis that the trial court has issued an opinion identifying and discussing the issues presented, and the court does not disagree with the opinion. Plaintiff's motion for summary affirmance or, in the alternative, for dismissal or declination is, therefore, moot.

Brock, C.J., and Horton and Broderick, JJ., did not participate; Groff, Mangones, and Mohl, JJ., superior court justices, participated by special assignment under RSA 490:3.

Distribution:

Clerk, Rockingham County Superior Court 99-E-0444
Sumner Kalman, Esquire
John J. Ryan, Esquire
Honorable Walter L. Murphy
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel,
Clerk

**APPENDIX L**

The State of New Hampshire

SUPERIOR COURT

ROCKINGHAM COUNTY ( X ) COURT
( ) JURY

WRIT OF SUMMONS

MDR Corporation
163 Kingston Road
Danville, New Hampshire 03819

v.

Town of Fremont
PO Box 120, 295 Main Street
Fremont, New Hampshire 03044

* * *

## ATTACHMENT

In a plea of law, whereas, Plaintiff, MDR Corporation ("Plaintiff') is the owner of Lots 03-191.01, 03-191.02, 03-191.05, 03-191.06, 03-191.07, 03-191.08, 03-191.09, 03-191.11 and 03-191.12 located in Fremont, New Hampshire;

That Defendant, Town of Fremont ("Defendant") as of August 1999 denied building permits to Plaintiff for each of the said lots based on Growth Control Limitations enacted by the Planning Board on April 14, 1999;

That on December 27, 1999 the Rockingham County Superior Court (Murphy, J) decided in the case of MDR Corporation v. Town of Fremont, Docket No. 99-E-0444 that "the Growth Control Ordinance, therefore is invalid ***ab initio*** for failing to comply with the statutory requirements of RSA 674:22";

That on February 23, 2000, the Fremont Planning Board enacted restrictions for the issuance of building permits to replace the restrictions enacted on April 14, 1999, pursuant to the "invalid" growth control ordinance (see exhibit "A", attached and incorporated by reference herein);

That according to those restrictions, the Town will not issue Plaintiff any permits until June 15, 2000, at the earliest;

That if the total number of permits issued as of June 15, 2000 exceeds 26, Plaintiff will not be entitled to any building permits for the year beginning March 15, 2000 and ending March 15, 2001;

That by applying the Growth Control Ordinance and refusing to issue building permits, the Town has and

continues to effectuate a temporary "taking" of Plaintiff's property from the point in time when the building permits were denied to the point in time when the permits are ultimately issued;

Takings, whether permanent or temporary, entitle Plaintiff to compensation. Burrows v. City of Keene, 121 NH 590(1981);

The Fifth Amendment of the United State Constitution provides "nor shall private property be taken for public use without just compensation." Similarly, Pt. 1, Art. 12 of the New Hampshire Constitution states "All men have certain natural, essential and inherent rights - among which are...acquiring, possessing, and protecting property...But no part of a man's property shall be taken from him, or applied to public uses, without his own consent...";

"Under the Just Compensation Clause, where the government has "taken" property by a land-use regulation, the landowner may recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"...A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provisions with respect to compensation..." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"The doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from the permanent takings for which the Constitution clearly requires compensation..."

First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

That the Town has filed a Notice of Appeal with the Supreme Court. As of the date of this writ, the appeal has not been accepted or declined. As a result, the Town continues to enjoy the enforcement of an illegal Growth Control Ordinance.

Plaintiff continues to suffer substantial monetary damages as a result of the Town's refusal to issue building permits under these circumstances.

All to the damage of Plaintiff in an amount to be determined as soon as all of Plaintiff's building permits have been issued and the outcome of the appeal determined and within the jurisdictional limits of this Court.

**APPENDIX M**

The State of New Hampshire

SUPERIOR COURT

ROCKINGHAM COUNTY ( X ) COURT
( ) JURY

WRIT OF SUMMONS

Henry Torromeo
92 Pond Street
Methuen, Massachusetts 01844

v.

Town of Fremont
PO Box 120, 295 Main Street
Fremont, NH 03044

* * *

## ATTACHMENT

In a plea of law, whereas, Plaintiff, Torromeo Industries, Inc. ("Plaintiff") is the owner of Lots 12, 12-01, 12-08, 12-09 and 12-20 in the Mason's Corner Subdivision in Fremont, approved by the Fremont Planning Board, recorded at the Rockingham County Registry of Deeds on February 6, 1997 and "vested" pursuant to RSA 674:39;

That Defendant, Town of Fremont ("Defendant") denied building permits to Plaintiff for those lots based on Growth Control Limitations enacted on April 14, 1999;

That the Town established an interim growth control ordinance/building permit limitation at Town Meeting in March of 1998. The Fremont Board of Selectmen stated by letter that Mason's Corner is exempt from said ordinance. Growth control and permit limitations were later enacted on April 14, 1999 which place restrictions on "vested" lots;

That "vested lots" pursuant to RSA 674:39 "are exempt from all subsequent changes in ...zoning ordinances adopted by any ...town...for a period of four years..." (emphasis added);

In August, 1999 Plaintiff was denied building permits for his five lots based on the Growth Control Limitations enacted on April 14, 1999;

That on December 27, 1999 the Rockingham County Superior Court (Murphy, J) decided in the case of MDR Corporation v. Town of Fremont, Docket no. 99-E-0444 that "The Growth Control Ordinance, therefore is invalid ***ab initio*** for failing to comply with the statutory requirements of RSA 674:22. This case is on appeal to the

New Hampshire Supreme Court, but is not dispositive to this cause of action;

That on February 2, 2000 the Rockingham County Superior Court (Galway, J) decided in the case of Torromeo Industries, Inc., et al v. Town of Fremont, Docket No. 99-E-0536 that "RSA 674:22 applies to growth management generally, but not to those subdivisions protected by the four year exemption period of RSA 674:39...". No appeal has been taken flow this decision;

That by applying the Growth Control Ordinance and refusing to issue any building permits, the Town effectuated a temporary "taking" of Plaintiff's property from the point in time when the building permits were denied to the point in time when the permits were ultimately issued. Permits for lots 12, 12-01, 12-08 and 12-20, though dated November 13, 1999, were not issued until February 10, 2000; the permit for lot 12-09, though dated September 29, 1999, was not issued until February 5, 2000. (Permits marked exhibit "A," attached and incorporated by reference herein);

Takings, whether permanent or temporary, entitle Plaintiff to compensation. Burrows v. City of Keene, 121 NH 590(1981);

The Fifth Amendment of the United State Constitution provides "nor shall private property be taken for public use without just compensation." Similarly, Pt. 1, Art. 12 of the New Hampshire Constitution states "All men have certain natural, essential and inherent rights - among which are...acquiring, possessing, and protecting property...But no part of a man's property shall be taken from him, or applied to public uses, without his own consent...";

"Under the Just Compensation Clause, where the

government has "taken" property by a land-use regulation, the landowner may recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"...A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provisions with respect to compensation..." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"The doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from the permanent takings for which the Constitution clearly requires compensation..." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

Mason's Comer consists of approximately twenty-

seven (27) lots. Substantial development has occurred (twenty two building permits have been issued), and this subdivision can not be affected by Growth Control Ordinances enacted after its approval; i.e. February 6, 1997;

The Town, by applying the illegal Growth Control Ordinance, effectuated a "taking" of all Plaintiff's use of its property;

Plaintiff suffered substantial monetary damages as a result of the Town's refusal to issue building permits under these circumstances.

All to the damage of Plaintiff in an amount to be determined within the jurisdictional limits of this Court.

**APPENDIX N**

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Torromeo Industries, Inc.& Vincent Iacozzi

v.

Town of Fremont

99-E-536

**ORDER**

Before the Court is the Plaintiffs' Petition for Declaratory Judgment Pursuant to RSA 491:22; Bill in Equity; Petition for Permanent Injunction; and Writ of Mandamus. This case arises out of the Town of Fremont's ("the Town") decision to deny plaintiff Vincent Iacozzi's request for a building permit. The Court conducted a final hearing on January 27, 2000.

For purposes of this Order, the Court finds the following facts. Plaintiff Torromeo Industries, Inc. ("Torromeo") owns a parcel of land located in Fremont, New Hampshire known as Mason's Corner. The land is subject to a subdivision plan that was approved by the Town Planning Board and registered with the Rockingham County Registry of Deeds on February 6, 1997. In March 1998, the Town enacted a one-year-long Interim Growth Management Ordinance that restricted the number of building permits to be awarded during that period. Since the enactment of the Interim Ordinance, the Town has awarded

building permits for twenty-two (22) of the twenty-seven (27) lots that comprise Mason's Corner.

In a letter dated March 18, 1999, the Town Board of Selectmen informed the plaintiffs that "it is our decision at this time that the Mason's Corner Subdivision project off of North Road in Fremont is exempt from the Interim Growth Management Ordinance under RSA 674:39." Plaintiffs' Exhibit 2. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Land Use Control Ordinance that imposed permanent restrictions on the number of building permits to be issued in any given year.

On April 14, 1999, pursuant to the growth management ordinance passed at the March 1999 Town meeting, the Town Planning Board enacted "Growth Control and Permit Limitations." These limitations provided that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners. See Defendant's Exhibit B. In addition, the Planning Board granted an unlimited number of building permits during the period from April 14, 1999 until June 15, 1999 to any lot owners with "vested" rights, provided that the permits must be acted on within thirty (30) days of issuance. Id.

Plaintiff Iacozzi sold his house in Londonderry, New Hampshire on August 25, 1999, with the intention of purchasing Lot 9 in the Mason's Corner subdivision and building a new house there. To that end, Iacozzi applied for a building permit on September 23, 1999. Citing the Town's Growth Control and Permit Limitations, the Town denied his request thirty days later, stating that all of the available

permits for vested lots had already been issued. The plaintiffs now appeal the Town's decision, seeking an injunction to bar the Town from denying the building permit, or alternatively, a writ of mandamus to compel the Town to grant the permit.

The plaintiffs assert that the Town's application of the Growth Control and Permit Limitations against them violates RSA 674:39, which provides in relevant part, that:

> [e]very plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county ... for a period of 4 years after the date of recording ... .

RSA 674:39. Only "those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements" may be applied to subdivisions during the four-year exemption period. Id. The Town does not deny that the growth control limits are zoning ordinances and does not argue that the limits "expressly protect public health standards." See Beck v. Town of Raymond, 118 N.H. 793, 797 (1978) (Supreme Court rejected town's "public health" argument where "slow-growth" zoning ordinance conflicted with RSA 674:39 predecessor statute). The Town, instead, claims that RSA 674:22 and 674:23, which permit towns to exercise growth management, supersede the four-year exemption. The Town believes that the growth control statutes and the four-year exemption statute are in conflict with each other, and that the growth control statutes must take precedence or

become void, since a significant portion of the Town's growth comes from the development of subdivisions.

The Court first notes that RSA 674:23 pertains to interim growth regulations only, and as such, has no application to the present dispute, since the plaintiffs applied for and were denied a building permit under the permanent ordinance provision, after the expiration of the Town's interim growth management ordinance. The relevant language of RSA 674:22 provides that towns "may further exercise the powers granted under this subdivision to regulate and control the timing of development" and only after the town prepares and adopts a master plan, a capital improvement program, and a growth management process to "assess and balance" the development needs of the community and the region. Given these restrictions on the manner in which a town might control growth, clearly RSA 674:22 does not accord unlimited power to the town to manage growth.

"When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Brosseau v. Green Acres Mobile Homes, 135 N.H. 643; 646 (1992) (quotation omitted); see Sprague Energy Corp. v. Town of Newington, 142 N.H. 804, 806 (1998); 73 Am.Jur.2d, Statutes, § 254 ("Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions"). The Court notes that RSA 674:39 has been amended by the legislature three (3) times (1989, 1991, and 1995) since RSA 674:22 took effect. In the 1991 amendment, (N.H. Laws 1991,

331:4), the legislature announced that the purpose of the amendment was "to confirm and re-emphasize the intent of the general court at the time of the enactment" of RSA 674:39 in favor of protecting new subdivisions from zoning ordinances. See Blue Mountain Forest Ass'n v. Town of Croydon, 119 N.H. 202, 205 (1979) (amendment clarifying former statute is strong evidence of legislature's original intent).

Within the language of RSA 674:39, the legislature specifically excepted from the four-year exemption any regulations "which expressly protect public health standards, such as water quality and sewage treatment requirements," proving that they were capable of creating exceptions to the four-year limit where they deemed appropriate. Because the legislature has amended RSA 674:39 since the adoption of RSA 674:22, and RSA 674:39 contains a list of specific exceptions to its applicability, the familiar axiom of statutory construction applies, *expressio unius est exclusio alterius:* "normally the expression of one thing in a statute implies the exclusion of another." St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996); see also Silva v. Botsch, 120 N.H. 600, 602 (1980) ("Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive").

The Court finds and rules that the statutes do not contradict each other, but rather that RSA 674:22 applies to growth management generally, but not to those subdivisions protected by the four-year exemption period of RSA 674:39. The Town's concern over the unfettered development of subdivisions might be addressed by controlling the number and type of subdivisions approved under the power granted by RSA 674:35, rather than by

approving a subdivision and then placing zoning restrictions on it later, during the four-year exemption period, in clear violation of RSA 674:39.

The Town further claims that it satisfied RSA 674:39 by issuing an unlimited number of permits between April 14, 1999 and June 13, 1999 in order "to reasonably accommodate any common law or statutory vested rights that any developer of a pre-existing subdivision might have." Def.'s Answer at 4. At oral argument, the Town made an offer of proof concerning school overcrowding in the Town and the measures enacted to accommodate vested property owners. Under the clear language of RSA 674:39, however, it is not unreasonable zoning restrictions that are prohibited, but rather all zoning restrictions, other than those expressly excepted, for a period of four years. For purposes of this action, the plaintiffs do not challenge, and the Court need not address, the reasonableness of the Town's actions, because the application of RSA 674:39 is clear and dispositive.

To be entitled to an injunction, the plaintiffs bear the burden of proving that there "is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." Unifirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) quoting Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). In addition, the court will balance the hardships to both parties. N.H. Donuts, Inc. v. Skipitaris, 129 N.H. 774, 781 (1987). "The granting of an injunction ... is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Varney v. Fletcher, 106 N.H. 464, 467-68 (1965).

Accordingly, the plaintiffs' request for Permanent Injunctive Relief is GRANTED. The Town is hereby enjoined from refusing to issue a building permit to plaintiff Iacozzi on the basis of the Growth Control Ordinance. The plaintiffs' request for attorney's fees is DENIED. The plaintiffs have submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. The plaintiffs' requests are GRANTED to the extent that they are consistent with this order; DENIED to the extent that they are inconsistent with this order; and NEITHER GRANTED NOR DENIED to the extent that they are irrelevant to the determination of this issue. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So **Ordered.**

DATE: January 31, 2000

/s/ Richard Galway
Richard E. Galway
PRESIDING JUSTICE

**APPENDIX O**

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

MDR Corporation

v.

Town of Fremont
99-E-444

**ORDER**

Before the Court is the Plaintiff's Amended Petition for Declaratory Judgment and Injunctive Relief challenging the validity of the Town of Fremont's ("the Town") Growth Control Ordinance and its decision to deny certain building permits to the plaintiff based on that ordinance. MDR brought this action on August 27, 1999 and filed an amendment to the Petition on October 21, 1999. This Court denied MDR's request for temporary injunctive relief on September 23, 1999. The Court conducted a final hearing on the merits on December 6, 1999.

For purposes of this Order, the Court finds the following facts. At the Town Meeting on March 11, 1987, after the forty-three (43) Articles set forth in the warrant were voted on, an oral motion was made, seconded, and passed:

> To see if the Town will vote to authorize the Selectmen to appoint a committee to prepare and submit recommendations to the Planning

> Board for a Capital Improvement Program; said committee to be composed of eight members, including representatives from the Planning Board, School Board, Police Department, Fire Department, Selectmen, Conservation Commission, Parks and Recreation Commission and from the general public.

MDR's Amendment to Petition at ¶ 7, 8. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Innovative Land Use Control as part of the Town Zoning Ordinance, replacing an Interim Growth Management Ordinance passed in 1998. Pursuant to the growth management ordinance passed at the March 1999 Town Meeting, on April 14, 1999, the Town Planning Board imposed "Growth Control and Permit Limitations." These limitations provide that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners.

The plaintiff, MDR Corporation ("MDR") owns a parcel of land in Fremont, New Hampshire known as Glidden Hill Estates, subject to a fourteen lot subdivision plan approved by the Town Planning Board on May 5, 1999 and registered with the Rockingham County Registry of Deeds on August 14, 1999. After the Ordinance had taken effect, MDR applied for six (6) building permits to construct single family homes on the property. The Town granted five (5) permits and told MDR that no further permits would be available until April 2000 at the earliest, citing the Town's 1999 Growth Management Ordinance in support of its decision to deny additional permits.

MDR challenges the legality of the Town's Growth Management and Innovative Land Use Control Ordinance ("the Ordinance"), asserting that the Town has failed to create a valid capital improvement program ("CIP"), as required by RSA 674:22, which states, in relevant part:

> The local legislative body may further exercise the powers granted under this subdivision to regulate and control the timing of development. Any ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs.

RSA 674:22 (emphasis added). The Town's "local legislative body" is the Town Meeting. See RSA 672:8, V. When properly authorized by a majority vote of the Town Meeting, a planning board may "prepare and amend a recommended program of municipal capital improvement projects...." RSA 674:5. "The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, ... shall be valid unless the subject thereof is so stated." RSA 39:2.

Since the motion to appoint a committee to make recommendations concerning a CIP was not among the forty-three (43) published Articles on the 1987 warrant (see *supra* at 1, 2), the motion was, therefore, invalid. Even if

the motion had complied with the notice requirements of RSA 39:2, it did not authorize the creation of a CIP, but rather, purported to authorize the Selectmen to create a committee to make recommendations concerning the substance of a future CIP. Since the motion was not valid, and the Town has not set forth any other evidence that the CIP is otherwise valid, the Town has never adopted a valid or enforceable CIP.

The Growth Control Ordinance, therefore, is invalid *ab initio* for failing to comply with the statutory requirements of RSA 674:22. Accordingly, MDR's request for Injunctive Relief is, GRANTED. The Town is hereby enjoined from refusing to issue building permits to MDR on the basis of the Growth Control Ordinance. MDR's request for attorney's fees is DENIED.

MDR has submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. MDR's requests are **GRANTED** to the extent that they are consistent with this order; otherwise, they are **DENIED.** See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So **Ordered**.

Date: December 27, 1999

/s/ Walter Murphy
Walter L. Murphy
**PRESIDING JUSTICE**

# APPENDIX P

## New Hampshire Constitution

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### First Part, Article 12

**Protection and Taxation Reciprocal.**--- Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

---------*---------

Supreme Court, U.S.
FILED
AUG 2 2 2006
OFFICE OF THE CLERK

(4)

No. 06-112

# In the Supreme Court of the United States

HENRY TORROMEO, *et al.*,
*Petitioners*,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Do compelling reasons exist to review the First Circuit's dismissal of Petitioners' federal takings claims where the federal takings claims were asserted and decided in the underlying state court action and the First Circuit's dismissal is completely consistent with this Court's recent decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005)?

II. Do compelling reasons exist to review the First Circuit's dismissal of Petitioners' substantive due process claim in light of the fact that the standard employed by the First Circuit is consistent with this Court's prior decisions, including its recent decision in *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003)?

## TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iv

INTRODUCTION . . . . . 1

STATEMENT OF THE CASE . . . . . 3

I. *The First State Court Action* . . . . . 3

II. *The Second State Court Action* . . . . . 4

III. *The District Court Decision* . . . . . 6

IV. *The First Circuit Decision* . . . . . 7

REASONS FOR DENYING THE PETITION . . . . . 9

I. THE DISMISSAL OF PETITIONERS' FEDERAL TAKINGS CLAIMS IS IN ACCORD WITH GENERAL PRINCIPLES OF *RES JUDICATA* AND CONSISTENT WITH THIS COURT'S DECISION IN *SAN REMO* . . . . . 9

II. THE FIRST CIRCUIT APPLIED THE CORRECT STANDARD WHEN IT DISMISSED PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIMS . . 13

CONCLUSION . . . . . 17

APPENDIX . . . . . 1b

## TABLE OF AUTHORITIES

**CASES** **Page(s)**

*Burrows v. City of Keene*,
121 A.2d 590 (N.H. 1981) . . . . . 11

*City of Chicago v. Int'l Coll. of Surgeons*,
522 U.S. 156 (1997) . . . . . 12, 13

*County of Sacramento v. Lewis*,
523 U.S. 833 (1998) . . . . . 14

*Cuyahoga Falls v. Buckeye Community Hope Foundation*,
538 U.S. 188 (2003) . . . . . *passim*

*Daniels v. Williams*, 474 U.S. 327 (1986) . . . . . 14

*Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*,
544 U.S. 280 (2005) . . . . . 7

*First English Evangelical Lutheran Church v. Los Angeles County*,
482 U.S. 304 (1987) . . . . . 8, 9

*Lingle v. Chevron U.S.A., Inc.*,
544 U.S. 528 (2005) . . . . . 16, 17

*Rochin v. California, 342 U.S. 165 (1952)* . . . . . 14

*San Remo Hotel, L.P. v. City and County of San Francisco*,
545 U.S. 323 (2005) . . . . . *passim*

*Sanderson v. Town of Candia*,
787 A.2d 167 (N.H. 2001) . . . . . 2, 11

*Torromeo v. Town of Fremont*,
539 U.S. 923 (2003) . . . . . 6

*Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*,
473 U.S. 172 (1985) . . . . . 12, 13

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

U.S. Const. Fifth Amendment . . . . . *passim*

U.S. Const. Fourteenth Amendment . . . . . 6

New Hampshire Const. Pt., Art. 12 . . . . . 4

Sup. Ct. R. 10. . . . . 1

## INTRODUCTION

The Petition for Writ of Certiorari (the "Petition") should be denied because it fails to demonstrate "compelling reasons" that warrant appellate review by this Court. *See* Sup. Ct. R. 10. Petitioners first contend that the First Circuit erred in dismissing their federal takings claims based on *res judicata* because Petitioners never asserted a federal takings claim in the state-court action. Petitioners' position is directly contradicted by the pleadings filed in the state-court action. Indeed, Petitioners spent two pages in their state-court complaint asserting takings claims based on the "Fifth Amendment" with specific citation to federal law. What is more, when the New Hampshire Supreme Court rejected Petitioners' takings claim, Petitioners filed a Petition for Writ of Certiorari with this Court seeking review of their takings claims under the Fifth Amendment Takings Clause. Finally, Petitioners' efforts to reconstrue the claims in the state-court action are belied by the federal Complaint they filed in this matter, which expressly acknowledges that the purpose of the state-court action was "to obtain just compensation for a taking under the U.S. and New Hampshire Constitution." It is disingenuous, at best, for Petitioners to now claim that they never asserted a federal takings claim in the state-court action.

Petitioners' alternative contention that their federal takings claims were not adjudicated because the claims were not ripe is similarly without merit based on this Court's recent decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). In *San Remo*, this Court held that state courts may hear a plaintiff's request for compensation under state law simultaneously with an alternative claim that the denial of compensation violates the Fifth Amendment of the Federal Constitution. *Id.* Petitioners asserted both state and federal takings claims and, as such, the

federal takings claims were ripe for adjudication. What is more, even if Petitioners federal takings claims were not barred by *res judicata*, they would be barred by issue preclusion pursuant to *San Remo*. In *San Remo*, this Court held that where state takings law is coextensive with federal takings law and the state court concludes that no taking has occurred under state law, a plaintiff's subsequent effort to bring a federal takings action in federal court is barred by issue preclusion. *Id.* As Petitioners acknowledge, New Hampshire regards state and federal takings claims as equivalent. *See Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001). The New Hampshire Supreme Court rejected Petitioners' takings claims. Pursuant to *San Remo*, Petitioners' efforts to revive those claims in federal court are barred by issue preclusion.

Petitioners similarly fail to present compelling reasons for this Court to review the First Circuit's dismissal of their substantive due process claims. The standard employed by the First Circuit is consistent with this Court's previous rulings and consistent with the standards in other jurisdictions. The First Circuit's decision is also consistent with this Court's decision in *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), in which this Court held that the refusal to issue building permits pursuant to an unconstitutional provision in a municipal charter does not violate substantive due process. Petitioners have failed to assert any basis for this Court to overturn the *Cuyahoga Falls* decision.

In short, Petitioners have failed to establish that compelling reasons exist for this Court to grant the Petition. Accordingly, the Petition should be denied.

## STATEMENT OF THE CASE

Respondent submits the following Statement of the Case in order to clarify certain misstatements and/or omissions in the Petition.

### I. *The First State Court Action*

Petitioner Henry Torromeo ("Torromeo") is the developer of Mason's Corner, a twenty-seven lot residential subdivision in Fremont, New Hampshire (the "Town"). Pet. App. at 44a. The subdivision plan was approved by the Fremont Planning Board and recorded in February 1997. *Id.* Petitioner MDR Corporation ("MDR") is the developer of Glidden Hill Estates, a fourteen lot subdivision also located in Fremont. *Id.* at 22a. In 1999, the Town approved MDR's subdivision plan and MDR recorded the plan in the Rockingham County Registry of Deeds. *Id.*

In March 1999, the Town adopted a growth control ordinance (the "Ordinance") which authorized the Fremont Planning Board to limit the number of building permits issued annually for the construction of residential units within the Town. Pet. App. at 17a. Pursuant to the Ordinance, the Town implemented a "Growth Control and Permit Limitations," which limited to 16 the number of building permits that it would issue to property owners during the one-year period between April 14, 1999, and April 13, 2000. *Id.* Within that time frame, MDR requested fourteen permits to construct single-family units at Glidden Hill Estates. *Id.* The Town issued only five permits and informed MDR that it must wait until April 2000 before additional building permits would issue for that development. *Id.* at 18a. Torromeo also sought building permits for the five remaining lots at Mason's Corner. *Id.* The Town denied Torromeo's request because

it had already issued the maximum number of building permits for that year. *Id.*

In August 1999, Torromeo filed a petition for declaratory judgment in the Rockingham County Superior Court, claiming that because the Town approved his subdivision plan prior to adopting the Ordinance, he was exempt from the provisions of the Ordinance pursuant to New Hampshire law. Pet. App. at 18a. The trial court agreed and ordered the Town to issue the requested building permits. *Id.* The Town complied and issued the five building permits to Torromeo. *Id.*

MDR also filed a petition for declaratory judgment in the same court. Pet. App. at 18a. MDR argued that the Ordinance was invalid because the Town never legally adopted a capital improvement program ("CIP"), which, pursuant to New Hampshire law, is a prerequisite to the adoption of a growth control ordinance. *Id.* The trial court agreed, ruling that the Town failed to adopt a valid CIP and, therefore, the Ordinance was invalid *ab initio*. *Id.* The New Hampshire Supreme Court affirmed the decision on appeal. *Id.* The Town then issued the requested building permits to MDR. *Id.*

II. *The Second State Court Action*

In March 2000, Petitioners filed separate lawsuits against the Town in the New Hampshire Superior Court, seeking compensation for the temporary taking of their property during the period in which they were denied the building permits. Pet. App. at 75a-83a. The state-court complaints asserted that the Town's conduct violated both the Fifth Amendment of the United States Constitution and Pt. 1, Art. 12 of the New Hampshire Constitution and included more than a page of citations to decisions by this Court defining a

property owner's rights under the Fifth Amendment Takings Clause. *Id.* The cases were consolidated and, in March 2001, the trial court ruled that Petitioners were entitled to recover damages for economic loss due to the Town's attempted enforcement of the Ordinance. Pet App. at 58a-68a. The trial court subsequently awarded $71,600 to MDR and $23,800 to Torromeo. *Id.*

The Town appealed the decision to the New Hampshire Supreme Court. Pet. App. at 50a. In their joint brief, Petitioners cited both the state and federal constitutions in support of their view that the trial court had properly found that they were entitled to compensation for the temporary taking of their property. Pet. App. at 19a ("The Town, by imposing the invalid Growth Ordinance, caused a 'taking' of plaintiff's property violating their protected right to use and enjoy their property as a fundamental right protected by both our State and Federal Constitutions. . . ."); *Id.* at 20a ("The right to use and enjoy one's property is a fundamental right protected by both our State and Federal Constitution. The Fifth Amendment of the United [States] Constitution provides, 'nor shall private property be taken for public use without just compensation'.").

The New Hampshire Supreme Court concluded that Petitioners were not entitled to compensation and, therefore, reversed the trial court's damage award. Pet. App. at 43a-49a. Specifically, the court held that while the Ordinance had previously been declared invalid, Petitioners had not demonstrated that the Ordinance was unconstitutional. *Id.* at 48a. The court went on to discuss the distinction between a local ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. *Id.* It then noted that absent proof that the Ordinance was unconstitutional, rather than merely procedurally flawed,

"this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy." *Id.* Accordingly, the New Hampshire Supreme Court held that Petitioners were "not entitled to damages, and . . . their only remedy [was] issuance of the erroneously-denied building permits." *Id.* at 48a-49a.

Petitioners then filed a Petition for Writ of Certiorari with this Court (Docket No. 02-1507). Res. App. at 1b. Again, Petitioners relied upon the United States Constitution in support of their view that they were entitled to compensation from the Town for the temporary taking of their property. In this regard, Petitioners identified the questions presented as "Liability for Fifth Amendment Taking" and "Remedy for Fifth Amendment Taking," and identified the constitutional provision at issue as the "Takings Clause of the Fifth Amendment to the United States Constitution." Res. App. at 2b-3b. In addition, the Petition stated that "Torromeo and MDR each filed actions in the Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions." *Id.* at 10b (parenthetical in original). This Court denied the Petition for Writ of Certiorari. *See Torromeo v. Town of Fremont*, 539 U.S. 923 (2003).

III. *The District Court Decision*

Having been denied relief by both the New Hampshire Supreme Court and this Court, Petitioners filed a three-count Complaint against the Town in the United States District Court for the District of New Hampshire, asserting claims for: (1) violation of the Takings Clause of the Fifth and Fourteenth Amendments of the United States Constitution; (2) violation of Petitioners' substantive due process rights; and (3) violation of Petitioners right to equal protection. Pet. App. at 29a-39a. The federal Complaint stated that the

purpose of the state-court action was "to obtain just compensation for a taking under the **U.S. and New Hampshire Constitutions**." *Id.* at 34a, ¶ 21 (emphasis added).

The Town moved to dismiss the federal Complaint on the grounds that the claims were barred by *res judicata* and/or the *Rooker-Feldman* doctrine. Pet. App. at 15a-16a. The District Court dismissed based on *Rooker-Feldman*, holding that Petitioners' "federal lawsuit [was] little more than a thinly disguised effort to reverse the New Hampshire Supreme Court's decision rejecting their claimed entitlement, under the Fifth Amendment, to the damages for the temporary 'taking' of their real property." *Id.* at 22a. The District Court alternatively held that the claims were barred by *res judicata* because the Fifth Amendment claim was in fact asserted and adjudicated in the state court proceeding, and the due process and equal protection claims could have been adjudicated in that proceeding. *Id.* at 26a-29a.

IV. *The First Circuit Decision*

Petitioners appealed to the United States Court of Appeals for the First Circuit. The First Circuit affirmed the District Court's dismissal of the federal takings claims on *res judicata* grounds.[1] Pet. App. at 1a-11a. The First Circuit rejected

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[1] The First Circuit chose not to address the *Rooker-Feldman* issue in light of its determination that dismissal was appropriate based on *res judicata* and in light of this Court's recent decision in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). The Town asserts that the District Court's dismissal of Petitioners' claims based on the *Rooker-Feldman* doctrine was proper even after this Court's decision in *Exxon Mobil*.

Petitioners contention that they had not asserted federal takings claims in the state-court action, finding that

> [Petitioners] state-court complaint identified the Takings Clause of the Fifth Amendment to the United States Constitution as a basis for the cause of action. The complaint also cited *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), a Supreme Court case interpreting the Takings Clause. In addition, after losing in the New Hampshire courts, [Petitioners] filed a writ of certiorari with the United States Supreme Court claiming that the New Hampshire decision violated their rights under the federal Takings Clause. These filings demonstrate a federal takings claim was actually litigated in the ~~state-court~~ action . . . Indeed, [Petitioners] admitted as much in their federal complaint which states that the state-court proceedings were actions "to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions."

*Id.* at 7a. The First Circuit concluded that Petitioners had asserted federal takings claims in the state-court action, that those claims had been decided, and, accordingly, that Petitioners were barred by *res judicata* from relitigating those claims in federal court.

The First Circuit also affirmed the District Court's dismissal of Petitioners' substantive due process and equal protection claims.[2] Pet. App. at 9a-10a. The First Circuit first recognized that a refusal to issue a building permit

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[2] Petitioners have not appealed the dismissal of their equal protection claims.

ordinarily does not implicate substantive due process. *Id.* at 10a. The First Circuit then concluded that in this case, the Town's decision not to issue building permits pursuant to an ordinance that was later found to be procedurally defective did not establish the use of government power for purposes of oppression, did not shock the conscience, and was not legally irrational. *Id.* Accordingly, the First Circuit dismissed Petitioners' substantive due process claims on the merits. *Id.*

## REASONS FOR DENYING THE PETITION

### I. THE DISMISSAL OF PETITIONERS' FEDERAL TAKINGS CLAIMS IS IN ACCORD WITH GENERAL PRINCIPLES OF *RES JUDICATA* AND CONSISTENT WITH THIS COURT'S DECISION IN *SAN REMO*

Petitioners first contend that the First Circuit erred by dismissing their federal takings claims based on *res judicata* because they never asserted federal takings claims in the state-court action. This contention is directly contradicted by Petitioners' own state-court filings, including:

- The state-court complaints which identify the Takings Clause of the Fifth Amendment as a basis for Petitioners' claims and spend more than a page citing this Court's decision in *First English* in support of their Fifth Amendment takings claims. Pet. App. at 75a-83a.

- Petitioners' joint brief to the New Hampshire Supreme Court which cites both the state and federal constitutions in support of their view that the trial court properly found that they were entitled to compensation for the temporary taking of their

property. Pet. App. at 19a ("The Town, by imposing the invalid Growth Ordinance, caused a 'taking' of plaintiff's property violating their protected right to use and enjoy their property as a fundamental right protected by **both our State and Federal Constitutions**. . . . (emphasis added)); *Id.* at 20a ("The right to use and enjoy one's property is a fundamental right protected by **both our State and Federal Constitution**. The **Fifth Amendment** of the United [States] Constitution provides, 'nor shall private property be taken for public use without just compensation'." (emphasis added)).

- Petitioners previous Petition for Writ of Certiorari which identifies the Questions Presented as "Liability of Fifth Amendment Taking" and "Remedy for Fifth Amendment Taking," and identifies the constitutional provision at issue as the "Takings Clause of the Fifth Amendment to the United States Constitution." Res. App. at 2b-3b. In addition, the Petition stated that "Torromeo and MDR each filed actions in the Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions." *Id.* at 10b.

The federal Complaint also confirms that Petitioners had asserted Fifth Amendment takings claims as part of the state-court action by stating that the purpose of the state-court action was "to obtain just compensation for a taking **under the U.S. and New Hampshire Constitutions**." Pet. App. at 34a, ¶ 21 (emphasis added). Petitioners current claims to the contrary are without merit and do not establish a compelling reason to grant the Petition.

Petitioners alternatively argue that even if they did assert federal takings claims in the state-court action, those claims were not ripe for adjudication and, therefore, are not barred by *res judicata*. Petitioners' argument, however, directly contradicts this Court's recent decision in *San Remo*. In *San Remo*, this Court held that state courts may hear a plaintiff's request for compensation under state law simultaneously with an alternative claim that the denial of compensation would violate the Fifth Amendment of the Federal Constitution. *San Remo*, 545 U.S. at 323. Petitioners asserted both state and federal takings claims in the state-court action and, pursuant to *San Remo*, the federal takings claims were ripe for adjudication.

Furthermore, even if the Court were to accept Petitioners' assertion that they did not assert federal takings claims or that the claims were not ripe for adjudication, the claims are still barred by issue preclusion pursuant to *San Remo*. In *San Remo*, this Court held that where state takings law is coextensive with federal takings law and the state court concludes that no taking has occurred under state law, a plaintiff's subsequent effort to bring a federal takings action in federal court is barred by issue preclusion. *San Remo*, 545 U.S. at 323. As Petitioners acknowledge, New Hampshire regards state and federal takings claims as equivalent. *See Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001); *Burrows v. City of Keene*, 121 A.2d 590 (N.H. 1981). The New Hampshire Supreme Court rejected Petitioners' takings claims. Pursuant to *San Remo*, Petitioners' efforts to revive those claims in federal court are barred by issue preclusion regardless of whether the federal takings claims were either asserted or ripe.

Petitioners next contend that certiorari is appropriate because there is a conflict among the Circuit's regarding the

preclusive effect of a state-court's adjudication of a takings claim pursuant to *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). As explained above, to the extent that such a conflict existed, the conflict was resolved by *San Remo*. *San Remo* makes clear that state and federal takings claims may be brought simultaneously in state-court actions. *San Remo*, 545 U.S. at 323. A plaintiff who chooses to assert state and federal takings claims simultaneously, as Petitioners did in this case, does so at his own risk and is barred by *res judicata* from attempting to later relitigate his federal claims in the federal courts. *Id*. *San Remo* also makes clear that, where state law provides that state takings claims are coextensive with federal takings claims, plaintiffs are barred by issue preclusion from attempting to later relitigate their federal claims in federal courts. *Id*. Plaintiffs, in short, have no right to have their federal takings claims heard in a federal forum. *Id*. *San Remo*, therefore, resolved any split that existed among the Circuits regarding the proper application of *Williamson*.

Petitioners next argue that appellate review is necessary because the First Circuit's decision potentially impacts their right to a jury trial and is inconsistent with this Court's decisions concerning the removal of federal takings claims. These issues are simply red herrings. Petitioners had a right to a jury trial in the state-court action, but instead chose to proceed with a bench trial. Petitioners, therefore, have no basis to argue that the First Circuit's decision deprived them of a right to a jury trial. Petitioners' contention that the *San Remo* decision is inconsistent with this Court's decision in *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997) also is without merit. Petitioners cite *City of Chicago* for the proposition that this Court has sanctioned the removal of federal takings claims even where state takings remedies have not been exhausted. The impact of *Williamson* was not

raised or addressed in *City of Chicago* and, in fact, *Williamson* is not even mentioned in the decision. Petitioners' suggestion that the *City of Chicago* decision is somehow at odds with *San Remo* and *Williamson* is based on a misunderstanding and/or misrepresentation of the *City of Chicago* decision. In any event, this case does not involve the removal of a federal takings claim and Petitioners have no basis to seek appellant review of a non-existent issue.

Finally, Petitioners argue that this Court should use this case to re-visit the *Williamson* decision. This case is not the appropriate vehicle for such review. Petitioners asserted federal takings claims in the state-court action and, thus, made the conscious decision to have both their state and federal takings claims decided by the state court. By doing so, Petitioners took themselves outside the *Williamson* decision. Thus, even if the Court were to reconsider *Williamson*, the result would be the same – Petitioners' federal takings claim still would be barred by *res judicata*. As a result, Petitioners have failed to state a compelling reason for this Court to reconsider *Williamson*.

## II. THE FIRST CIRCUIT APPLIED THE CORRECT STANDARD WHEN IT DISMISSED PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIMS

Petitioners claim that the Town's decision not to issue the requested building permits based on the provisions of a procedurally defective ordinance constituted a violation of their substantive due process rights. The First Circuit concluded that this assertion alone was insufficient to establish a substantive due process claim. In doing so, the First Circuit held that

> The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, **substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest**. Although we have left the door slightly ajar for federal relief in truly horrendous situations, the threshold for establishing the requisite abuse of governmental power is a high one indeed.

Pet. App. at 9a. (emphasis added).

Petitioners now question whether the First Circuit employed the correct standard in dismissing its substantive due process claims. This Court, however, has consistently held that a plaintiff must establish the existence of "egregious and arbitrary government conduct" in order to state a valid substantive due process claim. *See Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198 (2003) (applying "egregious and arbitrary government conduct" standard to substantive due process claim in land-use context); *See also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (holding that substantive due process serves to prevent governmental power from being "used for purposes of oppression"); *Rochin v. California*, 342 U.S. 165 (1952) (articulating the "shocks the conscience" test as a basis for substantive due process claim). The standard employed by the First Circuit to dismiss Petitioners' substantive due

process claims is completely consistent with the substantive due process standard articulated in the above cases.

This Court's decision in *Cuyahoga Falls* further confirms that the First Circuit applied the correct standard and properly dismissed Petitioners' substantive due process claims. In *Cuyahoga Falls*, the City of Cuyahoga (the "City") passed a site-plan ordinance authorizing Buckeye Community Hope Foundation ("Buckeye") to build a low-income housing complex. *Cuyahoga Falls*, 538 U.S. at 191. A group of citizens who opposed the project filed a formal petition requesting that the ordinance be repealed or submitted to a popular vote. *Id.* at 192. Pursuant to the City's charter, the filing of the referendum petition stayed the site plan's implementation until the vote. *Id.* As a result, the City refused to issue building permits to Buckeye while the referendum was pending. *Id.* The voters eventually approved the referendum and repealed the ordinance. *Id.* at 192-93. Buckeye challenged the referendum in state court and the Ohio Supreme Court determined that the referendum process was unconstitutional. *Id.* at 193. The City then issued the building permits to Buckeye. *Id.*

While the state litigation was pending, Buckeye filed a federal suit asserting, *inter alia*, that the City's refusal to issue the building permits constituted a substantive due process violation. *Cuyahoga Falls*, 538 U.S. at 193. The City moved for summary judgment and the District Court granted the motion on the grounds that the City's refusal to issue the building permits did not rise to the level of a substantive due process violation. *Id.* Buckeye appealed and the Sixth Circuit reversed, holding that there was a "genuine issue of material fact as to whether the City, by denying respondents the benefit of the lawfully approved site plan, engaged in

arbitrary and irrational government conduct in violation of substantive due process." *Id.*

The City appealed to this Court which reversed, finding that the City's "refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct." *Cuyahoga Falls*, 538 U.S. at 193. In reaching this conclusion, this Court recognized that "[i]n light of the charter's provision that '[n]o such ordinance [challenged by a petition] shall go into effect until approved by a majority of those voting thereon' . . . [the City's decision] not to issue the permits represented an eminently reasonable directive." *Id.*

In this case, Petitioners claim the Town attempted to enforce an ordinance that turned out to be invalid because of a procedural defect. As with the builder in *Cuyahoga Falls*, Petitioners do not allege any facts to support their assertion that the Town used its governmental powers for purposes of oppression, engaged in conduct that shocks the conscience, or acted in an otherwise egregious, arbitrary or irrational manner when it decided not to issue the permits. The First Circuit, thus, properly dismissed Petitioners' substantive due process claims in accordance with this Court's previous decisions.

Petitioners attempt to circumvent *Cuyahoga Falls* by arguing that this Court articulated a different standard for substantive due process claims in the land-use context in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). *Lingle*, however, simply held that the "substantially advances legitimate state interests" test is not the proper test for determining Fifth Amendment takings claims. *Id.* at 545. There is nothing in the *Lingle* decision that supports Petitioners' argument that this Court intended to alter its long-standing precedents regarding the standards for establishing

a substantive due process violation. Petitioners arguments to this effect constitute a misguided effort to manufacture a basis for this Court to grant the Petition.

In any event, the *Lingle* decision states that "[t]he 'substantially advances' formula suggests a means-end test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose . . . a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 542 (emphasis in original). The "substantially advances" formula, therefore, is a restatement of the "egregious and arbitrary" formula that this Court has consistently applied to substantive due process claims. The First Circuit, thus, applied the proper standard and properly dismissed Petitioners' substantive due process claim. Petitioners have failed to assert any compelling reasons for this Court to review that decision.

## CONCLUSION

Petitioners have failed to satisfy their burden of establishing compelling reasons for this Court to grant the Petition. Therefore, the Town respectfully requests that the Petition be denied.

Respectfully submitted,

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**APPENDIX**

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No.

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT,
Respondent.

On Petition for Writ of Certiorari To
The Supreme Court of New Hampshire

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. **Liability for a Fifth Amendment Taking:** When a state's highest court declares a growth control regulation "invalid *ab initio,"* but a town had enforced that illegal regulation in excess of its police powers against a specific piece of property, is the town liable to the affected property owner for a taking because it has failed to "substantially advance legitimate state interests"? *(Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).

2. **Liability for a Fifth Amendment Taking:** Alternatively, when a state's highest court declares a growth control regulation "invalid *ab initio"* but a town had enforced that regulation against a specific piece of property, should that illegal municipal conduct be considered under the "character of government action" factor set forth in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1.978), as one element to determine whether the town is liable for a taking?

3. **Remedy for a Fifth Amendment Taking:** Does the "self-executing character" of the Takings Clause compel the payment of "just compensation" to an aggrieved property owner for the time period in which a growth control regulation, declared "invalid *ab initio"* by a state's highest court, was enforced against a specific piece of property? *(First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987)).

## PETITION FOR WRIT OF CERTIORI

Henry Torromeo and MDR Corporation ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire, dated December 13, 2002. Appendix ("App.") 1.

## OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire is reported at 813 A.2d 389 (N.H. 2002). (App. 1-6.) Orders of the New Hampshire Superior Court awarding Petitioners monetary damages (App. 7-17), and finding liability on the part of the Town as a matter of law for its land-use decisions (App. 18-25), are not reported.

## JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on December 13, 2002. (App. I.) On February 12, 2003, Justice Sourer extended the time to petition for certiorari to and including April 14, 2003. (App. 55.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation." It is applicable to the States through the Fourteenth Amendment,[1]

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[1] See *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001), citing *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226 (1897).

which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Article 12, Part 1 of the New Hampshire Constitution, the State's corollary to the Takings Clause, provides in pertinent part: "But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." (App. 39.) This provision has been interpreted to require the payment of compensation for a taking. *Burrows v. Keene,* 432 A.2d 15, 19 (N.H. 1981).

## STATEMENT OF THE CASE

Three points need to be made at the outset. First, the key fact in this case is that the Town of Fremont, New Hampshire (the "Town"), has applied and enforced an *illegal* growth control ordinance – so declared by the State's highest court – to inhibit otherwise legal development of Petitioners' land.

Second, Petitioners do not dispute that the Town has a legitimate interest to control growth. However, Petitioners *do* contest the constitutionality of the Town's actions when it enforced an illegal law against them. Certiorari should be granted to clarify that a municipality can violate the Takings Clause when it enforces an illegal land-use law, which a court declares was invalid from the start, and refuses to provide the constitutional remedy of "just compensation" promised by the Fifth Amendment.

Third, the posture of this case is a challenge to government action applying a land-use regulation to specific parcels of land. This is not a facial challenge against the constitutionality of an ordinance. Last term, the Court stated

that the specter of takings liability rises in as-applied cases such as this one. See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 334 (2002).

### A. Petitioners' Plans to Build 19 New Homes in Fremont, New Hampshire.

Originally part of Exeter, New Hampshire until it was incorporated in 1764, the Town of Fremont (the "Town") was first named "Poplin" after a prosperous mill town in England.[2] In 1854, the Town was re-named in honor of John C. Fremont, the first presidential candidate of the Republican party, who lost to Democrat James Buchanan in the 1856 election. Today, Fremont is a bedroom community of suburban Boston, a quiet town of neighborhoods that contain large residential lots with homes built from the same hardwood trees sustained since colonial times.

This case concerns two residential subdivisions in the Town. Petitioner MDR Corporation owned a 14-lot subdivision known as "Glidden Hill Estates." Petitioner Henry T orromeo owned the last five lots in a 27-lot

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[2] See www.seacoastonline.com/living/fremont.htm (last visited Apr. 8, 2003). Famous for its heavy growth of high quality hardwoods, the English Crown had reserved the Town's best trees for ship masts, but the Townspeople spirited off the remainder of the hardwoods to construct their homes and barns. Alarmed by the timber harvests, the royal Governor dispatched a surveyor to inspect the local mill for illegally cut mast trees. In 1734, the Mast Tree Riot took place in the Town, where locals rebelled by cutting down the tall trees prior to the surveyor's arrival. The Townspeople then later returned disguised as Indians and ambushed ten of the surveyor's troops. See www. newhampshire.com/pages/histmarkerseacoast.cfm (last visited Apr. 8, 2003).

subdivision known as "Mason's Corner." Both Petitioners desired to build homes on their lots and then sell the improved parcels. The Fremont Planning Board had fully reviewed and approved both projects to accommodate single-family homes.[3]

In March of 1999, the Town "adopted" the subject Growth Control Ordinance (the "Ordinance"), which gave the Planning Board authority to limit the number of building permits for residential units. (App. 45-51.) On April 14, 1999, the Fremont Planning Board acted on this authority by imposing "Growth Control and Permit Limitations" to restrict the number of building permits that it would issue to property owners during the year April 14, 1999, through April 13, 2000. (App. 52-53.)[4]

After the Ordinance's effective date, the Planning Board approved the Glidden Hill project and MDR requested six building permits to construct single-family homes at the site. The Town applied the Ordinance to MDR's project, granted only five permits, and told MDR it would have to wait at

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[3] "Navigating the subdivision approval process in New Hampshire is no small task. In accordance with zoning and subdivision regulations, Petitioners were obligated to prepare perimeter surveys, evaluate the topography of the property, perform high intensity soil surveys, and develop fully engineered plans showing all roadways and utilities. Additionally, Petitioners were required to secure various state permits, including dredge and fill permits, site specific permits, and curb cut permits.

[4] The Planning Board's "Growth Control and Permit Limitations" determined that a maximum of twenty-six (26) permits for residential construction could be issued throughout the Town, in the year from April 14, 1999 through April 13, 2000. (App. 52, ¶2.). Once a permit was issued, a builder had only 30 days to begin construction or else the permit would lapse. (App. 53, ¶313.)

least a year, until April 2000, at the earliest until additional permits for Glidden Hill could issue. After the Town issued only five permits, MDR applied for permits on the remaining nine lots to fully build-out the subdivision, which the Town also denied.

With regard to Mason's Corner, Torromeo personally owned the last five remaining house lots in the 27-lot subdivision. (He had previously built homes on and sold the other 22 lots.) This project was recorded with the county and eligible for building permits as of February 6, 1997 – more than two years before the Town adopted the Ordinance in March 1999. Because plats were recorded prior to the Ordinance, Mason's Corner qualified as a vested subdivision and was "exempt from all subsequent changes [in] zoning ordinances...for a period of four years .... " See RSA 674:39. (App. 43.) Nonetheless, when Torromeo applied for building permits on the five remaining lots in September 1999, the Town ignored Mason Corner's vested status and refused to issue the permits because the maximum number of approvals allowed by the Ordinance had been granted by that time.

A builder with a buildiiag lot, but no building permits, is denied use of his property. In addition to complying with all subdivision requirements, both MDR and Torromeo had built and paved the roads necessary to accommodate their plans, in reliance on prior Town and state approvals. See *supra* n. 3. Consequently, for roads alone, MDR spent over $225,000 and Torromeo spent over $775,000 for their respective projects. With unimproved lots valued at $85,000 each, both MDR and Torromeo could not build, had nothing of value to sell, and were not in a financial position to start over in another community, because their capital was tied up in the Town of Fremont.

**B. The New Hampshire Courts Decide That the Growth Control Ordinance is "Invalid, *Ab Initio,*" and That the Town Must Issue Building Permits to the Petitioners.**

Ordinarily, it would have been acceptable for the Town to deny Petitioners' building permits for a period of time. Except in this case there is a crucial distinction. The Town denied the permits based on an Ordinance that was ultimately deemed *illegal* by the New Hampshire courts, because it lacked the statutory requirements to support a valid growth control law.

After their respective building permits were denied, MDR and Torromeo each filed suits against the Town for injunctive relief to compel permit issuance. In the MDR suit, New Hampshire Superior Court Justice Walter Murphy granted the requested injunction in a decision dated December 27, 1999. (App. 28-31.) He decided that the permits should have been issued because the Ordinance was "invalid, *ab initio*"[5] for failure to meet requirements established by the New Hampshire legislature. (App. 30.) The Town appealed to the New Hampshire Supreme Court. On June 26, 2000, it summarily affirmed Justice Murphy's decision that the Ordinance was "invalid, *ab initio.*" (App. 27.)

In a nutshell, the lower courts found the Ordinance illegal because it was never supported by a validly enacted Capital Improvement Program ("CIP"), a statutory prerequisite in New Hampshire for any growth control ordinance. See RSA 674:22 (App. 42.) A CIP contemplates the orderly

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[5] Or, "[f]rom the beginning." *Black's Law Dictionary* 4 (7th ed. 1999).

construction of infrastructure projects like roads and sewers to control the timing of growth and to accommodate the community's projected needs. Under New Hampshire law, the local legislative body (known as the "Town Meeting") may regulate growth by authorizing the Planning Board "to prepare and amend a recommended program of municipal capital improvement projects over a period of at least 6 years." See RSA 674:5 (App. 41). To fully realize local democratic processes and foster public input, New Hampshire law directs that the Planning Board must publish a "warrant article" that "distinctly state[s]" the "'subject matter of all business to be acted upon at theTown Meeting ...."[6] RSA 39:2. (App. 40.) Under New Hampshire law, therefore, the Town was required to publish a warrant article informing the public that the Planning Board would be preparing a CIP.

But the Town never published such a warrant providing notice of the preparation of a CIP. As a result, the Town's citizens were deprived of a full and fair opportunity to speak to the vital issue of how, when, and where their community should grow. Without a valid CIP, the New Hampshire courts decided that the Ordinance - which propped the Town's denial of Petitioners' building permits - was "invalid, *ab initio*" and never should have been enforced. (App. 27, 30.)[7]

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[6] It has long been the law of [New Hampshire] that the purpose of [the warrant] requirement is to inform the inhabitants of the business upon which they are called to act in the meeting, to bring before the town substantially and intelligently the subject with which it has to deal." *Opinion of the Justices,* 134 A.2d 281, 283 (N.H. 1957) (citations omitted).

[7] Superior Court Judge Murphy rejected the Town's position that, at the end of its March 11, 1987 Town Meeting, a motion was made to appoint a committee to study the development of a future

Accordingly, on June 26, 2000, the Town issued the nine remaining building permits to MDR so homes could be built at Glidden Hill.

With regard to Mason's Corner, while the Town denied the building permits by color of the illegal Ordinance, Torromeo never even had to contest the Ordinance's statutory validity. His case was simpler because his last five lots were "vested" under New Hampshire statute, RSA 674:39 (see App. 43), and by law were exempt from the permit limitations of the Ordinance. Thus, on January 31, 2000, Superior Court Justice Richard Galway determined that building permits should issue for Mason's Corner. (App. 32-38.) The Town did not appeal this decision. Ultimately, in February 2000, the Town issued the five permits enabling Torromeo to build the last homes at Mason's Corner.

### C. Petitioners' Takings Lawsuits in State Court for Compensation.

Neither Torromeo's nor MDR's odyssey in the New Hampshire courts was over yet. Although permits were eventually issued to them, they had received no economic damages for the losses they sustained while the Town applied the illegal Ordinance to their respective properties. To obtain the remedy of "just compensation" that the Fifth Amendment makes available, Torromeo and MDR each filed actions in Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions.

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CIP. The motion was made after the Town Meeting had already considered 43 other published warrant articles under other business. But not a single pre-published warrant notified the public that a CIP would be addressed. (App. 30.)

At the start o takings phase of their suits, MDR and Torromeo filed motions for summary judgment on the issue of liability. On October 3, 2000, the trial Court initially denied the motions in a one-sentence order. (App. 26.) The trial court apparently accepted the Town's argument that the Ordinance was "merely" defective procedurally and the law itself needed to be "unconstitutional" before a taking would arise.

MDR and Torromeo then filed a "Request for Ruling of Law,"[8] arguing that the Town's refusal to issue building permits in reliance on the "invalid, *ab initio*" Ordinance was in and of itself an unconstitutional taking. On January 17, 2001, Superior Court Justice Kenneth McHugh reversed himself. He now believed that an award of damages *was* appropriate and Petitioners did "not have to prove the Ordinance is unconstitutional" to recover monetary relief. (App. 24.)

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[8] This procedure is allowed by New Hampshire Superior Court Rule 141 (parties may request "interlocutory orders...relative to proceedings preparatory for a hearing on the merits").

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Supreme Court, U.S.
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No. 06-112

# In The Supreme Court of the United States

HENRY TORROMEO and MDR CORPORATION,
*Petitioners,*

*v.*

TOWN OF FREMONT, NEW HAMPSHIRE,
*Respondent.*

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the First Circuit

## BRIEF OF *AMICUS CURIAE* THE HONORABLE STEVE CHABOT, CHAIR, SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES

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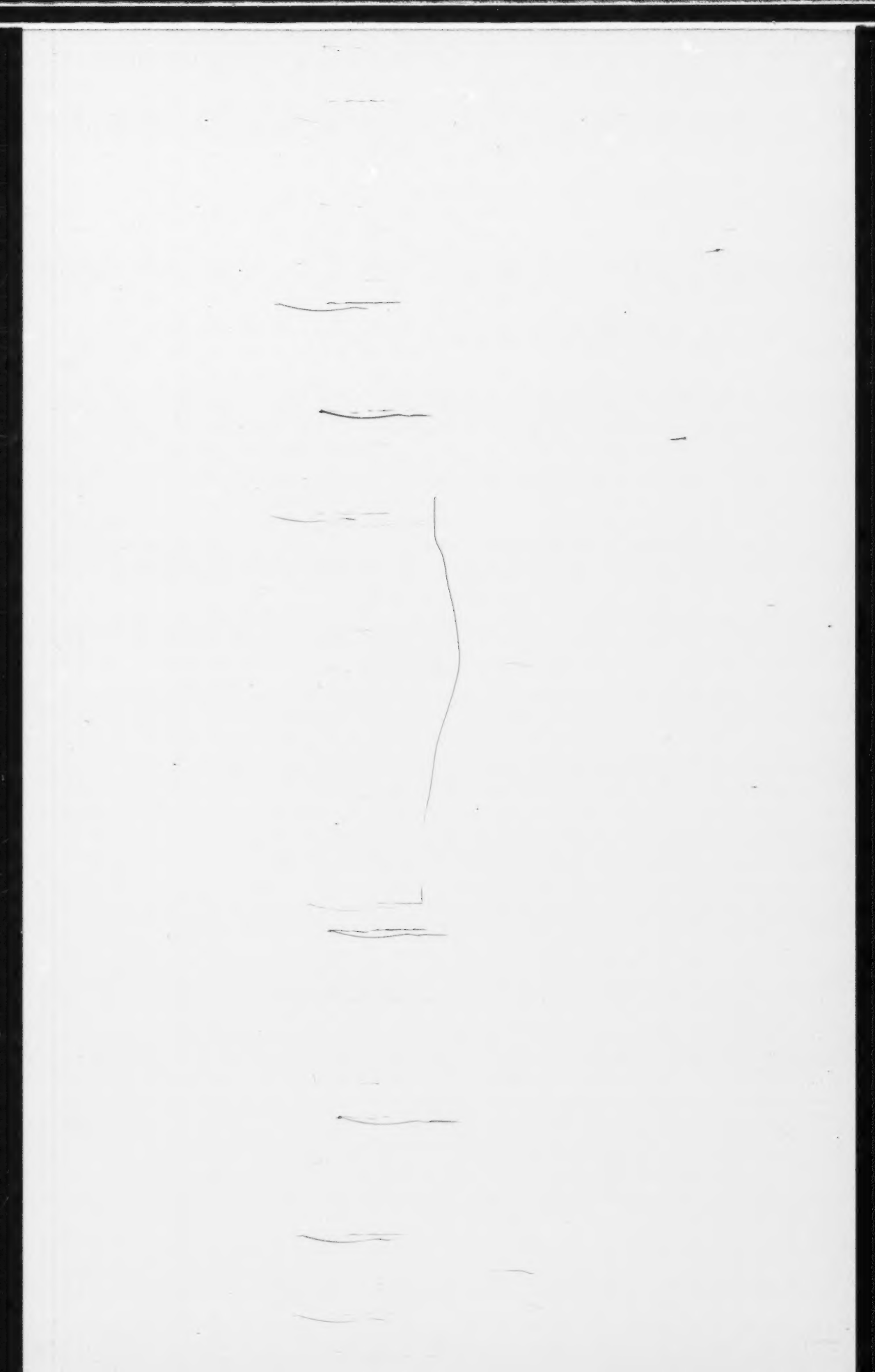

## TABLE OF CONTENTS

Page

Interest of the *Amicus Curiae* ..... 1

Summary of Argument ..... 2

Argument ..... 3

THIS COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF *WILLIAMSON COUNTY'S* STATE-LITIGATION RULE IN A MANNER THAT RESTORES THE RIGHT OF PROPERTY OWNERS TO PURSUE TAKINGS CLAIMS IN FEDERAL COURT, AND PROVIDES CONGRESS WITH GREATER GUIDANCE REGARDING CONSTITUTIONAL PROTECTIONS OF PROPERTY RIGHTS.

Conclusion ..... 10

## TABLE OF AUTHORITIES

**Cases** Page (s)

*City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) ..... 5

*City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) ..... 4

*Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ..... 4

*Kelo v. City of New London*, 545 U.S. ___, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005) ..... 8

*Monroe v. Pape*, 365 U.S. 167 (1961) ..... 4

*Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994) .... 6

*San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) ..... 2, 10

*Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004) ..... 7-8

*Sibbach v. Wilson*, 312 U.S. 1 (1941) ..... 10

*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) ..... *passim*

**Statutes**

28 U.S.C. § 1343 ..... 8-9

28 U.S.C. § 1441(a) ..... 5

42 U.S.C. § 1983 ..... 4, 9

**Other:**

H.R. 1534, The Private Property Rights Implementation Act of 1997, 105th Cong., 1st Sess. (1997) ..... 7

H.R. 2372, The Private Property Rights Implementation Act of 2000, 106th Cong., 2d Sess. (2000) ..... 7, 8

H.R. 4772, The Private Property Rights Implementation Act of 2006, 109th Cong., 2d Sess. (2006) ..... 2, 8, 9

H.R. Rep. No. 106-518, 106th Cong., 2d Sess. (2000) ..... 4, 6

G. Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions*, 10 J. Land Use & Envtl. L. 91 (1994) ..... 4-5

J. Delaney and D. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 202 (1999) ..... 5

## INTEREST OF THE *AMICUS CURIAE*

The Honorable Steve Chabot, Chair of the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives, has received the consent of the parties to file this brief as *amicus curiae* through letters of consent filed with the Clerk of the Court.[1]

The oversight jurisdiction of the House Subcommittee on the Constitution includes the constitutional protection of private property rights. This *amicus curiae* brief provides assistance to the Court by detailing the results of legislative investigations and proposals in the Congress to address the problems caused by the current application of the so-called "State-Litigation Rule" set forth in this Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

The Subcommittee has repeatedly determined over the last decade, and reaffirmed again this year, that the right of property owners to have Fifth Amendment takings claims adjudicated on the merits in the federal courts is being severely restricted, if not extinguished, by the current application of the State-Litigation Rule. It is with an appreciation of the gravity of this appeal that Chairman Chabot submits this brief respectfully to urge that the Court reverse the decision of the First Circuit in a manner that will restore the right of property owners to have Fifth

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[1] Pursuant to Rule 37.6 of the Court, counsel for the *amicus curiae* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no person or entities other than the *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Amendment takings claims adjudicated on the merits in the federal courts.

## SUMMARY OF ARGUMENT

This Court should grant *certiorari* to review the State-Litigation Rule adopted in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), but recently questioned in the concurring opinion of four justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005).

Between 1997 and 2000, the Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives inquired into the impact of this Court's 1985 requirement formulated in *Williamson County* that property owners must pursue takings claims in State court before their Fifth Amendment takings claims may be adjudicated by a federal court. The Subcommittee determined that *Williamson County* has almost universally denied property owners the ability to have a federal court determine the merits of a Fifth Amendment takings claim. As a result, in 1997 and again in 2000 the Subcommittee and the House of Representatives passed bills to "simplify and expedite access to the Federal courts," but without altering substantive Fifth Amendment takings claim standards.

In 2006, with the adverse effects of *Williamson County* still being felt, the Subcommittee took up the issue again and a new bill, H.R. 4772, the Private Property Rights Implementation Act of 2006, which would operate to similar effect, was approved by the House Judiciary Committee by voice vote. It is currently awaiting action by the full House.

Consistent with these bills, the *amicus curiae* respectfully submits that this Court should resolve the current conflict among the federal courts regarding access to the federal courts in a manner that eliminates or at least mitigates the obstacles that have resulted from *Williamson County* and provides guidance to Congress regarding the Supreme Court's understanding of the current scope of property rights protection.

## ARGUMENT

### THIS COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF *WILLIAMSON COUNTY'S* STATE-LITIGATION RULE IN A MANNER THAT RESTORES THE RIGHT OF PROPERTY OWNERS TO PURSUE TAKINGS CLAIMS IN FEDERAL COURT, AND PROVIDES CONGRESS WITH GREATER GUIDANCE REGARDING CONSTITUTIONAL PROTECTIONS OF PROPERTY RIGHTS.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner *cannot* claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." 473 U.S. at 195 (emphasis added). This Court did not say that the federal takings claim co-existed from the outset with the state claim, or that the plaintiffs in *Williamson County* were simply in the wrong forum. Rather, the Court held that a property owner *cannot* bring a federal takings claim until that claim has been litigated in state court and just compensation has been denied. In 1999, this Court

reaffirmed this interpretation, holding in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999), that a Fifth Amendment takings claim "does not accrue" until state law and procedures have been utilized. Thus, the guarantees of the Fifth Amendment[2] are treated differently in Federal courts than other Federal constitutional claims brought pursuant to 42 U.S.C. § 1983. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 183 (1961) (exhaustion of State judicial remedies not necessary).

*Williamson County* has caused a crisis in procedural takings law, because federal judges have interpreted it so as to avoid addressing the merits of federal takings claims. Federal courts often dismiss property owners' takings claims because the property owners have not first litigated their claims in State court. When the property owners return to court after litigating the State law claims in State court, the same Federal courts hold that Federal takings claims are barred because they could have been litigated in the State court proceedings. This is the so-called "*Williamson County* Trap."

From 1997 to 2000, the Subcommittee on the Constitution of the House Judiciary Committee conducted an inquiry into the impact of *Williamson County* on the rights of property owners under the Fifth Amendment's Takings Clause. The Subcommittee was provided with credible research showing that in 94 percent of all takings cases litigated between 1983 and 1988,[3] and in 83 percent

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[2] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("Fifth Amendment . . . should not be relegated to the status of a poor relation.")

[3] *See* H.R. Rep. No. 106-518, 106th Cong., 2d Sess. at 10 (2000), *citing* G. Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far*

of the takings claims initially raised in the federal district courts from 1990 to 1998, the federal court never reached the merits of the property owner's claim of a taking without just compensation.[4] Of those property owners who could afford to appeal their cases through the state courts and then proceed in federal court, 64 percent still failed to have their claims resolved on the merits. Moreover, in that small portion of appellate cases where a federal court found a takings claim to be procedurally ripe *and* addressed the merits, it took property owners "on the average, 9.6 years to have an appellate court reach its determination."[5] And these statistics do not address the low income or middle class property owners who, in the face of the expensive procedural challenges that stand between them and a federal forum on the merits of their federal civil rights claims, are too intimidated to even start down the long road to a hearing on the merits in federal court.

The Subcommittee also became aware of the inconsistency between *Williamson County* and *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997). In *City of Chicago*, this Court held that when constitutionally aggrieved landowners properly file their takings actions in state courts, municipal defendants may remove the cases to federal court. That decision relied on 28 U.S.C. § 1441(a), which permits removal of state court actions to federal courts only where the plaintiff could have initially filed the action in federal court. *Williamson*

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*Federal Courts Will Go To Avoid Adjudicating Land Use Decisions*, 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994).

[4] *See ibid., citing* J. Delaney and D. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse,* 31 Urb. Law. at 202-231 (1999), at 196.

[5] *Ibid.*

*County* and *City of Chicago* thus appear to be irreconcilable: if a municipality may remove a federal taking claim to federal court, then takings plaintiffs *must be allowed* to bring their claims in federal court from the start.

The Judiciary Committee's report that emerged from this investigation focused precisely on the consequences of *Williamson County* that underlie the instant appeal. The Report discussed the lengthy and expensive litigation required to pursue a takings claim through the state and then federal courts: for example, 14 years in *Del Monte Dunes*, and 13 years in *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994).[6]

> The expense of bringing a Federal Takings claim through the labyrinthine procedures in place today is disproportionately borne by private citizens, who unlike local governments, cannot draw on the public treasury to defend their rights. Hence, the current system tends to deter individuals from protecting their rights, uniquely guaranteed by the Bill of Rights, far more than it deters local governments from defending their actions.[7]

The Committee also took note of the application of claim and issue preclusion defenses to bar federal takings claims, as well as the use of various abstention doctrines, to close the doors of the Federal courthouse and put takings plaintiffs in a perpetual holding pattern.[8] The Report concluded: "The effect of the reasoning of these cases is that many property owners end up with *no opportunity* to

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[6] H.R. Rep. No. 106-518, 106th Cong., 2d Sess. (2000) at 5-8.

[7] *Ibid.* at 15.

[8] *Ibid.* at 8-9.

have their Federal constitutional claims heard in Federal court."[9]

To address these practical barriers to protecting Americans' property rights, legislation was first introduced in the 105th Congress. The Private Property Rights Implementation Act of 1997 (H.R. 1534, 105th Cong., 1st Sess. (1997)) was reported out by the House Judiciary Committee on October 21, 1997 and passed the full House on October 22, 1997 by a vote of 248-178. However, the Senate did not vote on the bill's merits before the end of the term.

During the 106th Congress, Representative Chabot's predecessor as Chair of the House Subcommittee on the Constitution, the Hon. Charles Canady, was the lead sponsor of the Private Property Rights Implementation Act of 2000. H.R. 2372, 106th Cong., 2d. Sess. (2000). Among other things, H.R. 2372 was designed to address the suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court.

Most significant to this case, H.R. 2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, in order to ensure that property owners like the Petitioners in this case have a meaningful opportunity to have the federal courts decide their federal takings claims. On March 16, 2000, H.R. 2372 passed the House of Representatives by a vote of 226-182, with Rep. Chabot's support.

Although H.R. 2372 was not approved by the entire Congress, the problems created by *Williamson County* have not abated since 2000. In *Santini v. Connecticut Hazardous*

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[9] *Ibid.* at 9 (emphasis in original).

*Waste Management Service*, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004), for example, the Second Circuit in 2003 addressed the merits of the plaintiffs' federal takings claim following litigation in the state system, which arose from events that occurred from 1991 to 1993. Even then, the Second Circuit, in allowing Santini to proceed and allowing Second Circuit litigants to reserve their federal claim during state court proceedings, effectively affirmed that Santini had been *properly required* to proceed through six years of state court litigation before his federal claim accrued and could even be pursued in federal court. And while this Court's decision in *San Remo* went on to overrule the claim reservation doctrine created by *Santini*, 125 S.Ct. at 2504, the salient point is that *San Remo* ended 12 years of litigation, without a federal court having ruled on the petitioners' Fifth Amendment takings claim.

Thus, these two cases highlight the two consequences of the *Williamson County* state court requirement that operated together to deny property owners their rights under the Takings Clause of the Fifth Amendment: the length of time in state court necessary to ripen the federal claim, and the property owner's inability to access the federal courts once the state court litigation has terminated.

In that context, and in light of the groundswell of popular reaction to this Court's decision in *Kelo v. City of New London*, 545 U.S. ___, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005), Chairman Chabot introduced in the 109th Congress a similar bill with bipartisan support in the House – the Private Property Rights Implementation Act of 2006. H.R. 4772, 109th Cong., 2d Sess. (2006). Like H.R. 2372, it would simplify and expedite access to the Federal courts for injured parties whose property rights under the United State Constitution have been deprived. Specifically,

Section 2 of H.R. 4772 would address the *Williamson County* dilemma directly by amending 28 U.S.C. § 1343 to add:

> In an action in which the operative facts concern the uses of real property, the district court shall exercise jurisdiction [over Section 1983 claims] even if the party seeking redress does not pursue judicial remedies provided by a State or territory of the United States.

H.R. 4772, 109th Cong., 2d Sess. (2006). The intent of this provision is to *overrule* any requirement from *Williamson County*, and the predominant interpretation adopted by the various circuit courts of appeals, that property rights plaintiffs must initially bring Fifth and Fourteenth Amendment claims in state court if they ever want to try and subsequently access federal court. In other words, under H.R. 4772, claimants under 42 U.S.C. § 1983 would have *immediate* access to federal courts to vindicate their takings, due process and equal protection claims in the land-use approval context.

In addition, Section 2 of H.R. 4772 would address concerns about federal abstention by further amending 28 U.S.C. § 1343 to add:

> Whenever a district court exercises jurisdiction [in a Section 1983 case] in which the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court if the party seeking redress does not allege a violation of a State law, right, or privilege, and no parallel proceeding is pending in state court that arises out of the same operative facts as the district court proceeding.

*Id.* H.R. 4772 was introduced with 36 co-sponsors on February 16, 2006. Following hearings, the Subcommittee on the Constitution discharged the bill to the full Committee on July 7, 2006. On July 12, 2006, H.R. 4772 was approved by the House Judiciary Committee by voice vote and sent to the House floor, where action is pending.

The procedural confusion engendered by *Williamson County* was informed by but not resolved in this Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). Nevertheless, the concurring opinion of the late Chief Justice Rehnquist noted the "dramatic impact" of the State-Litigation Rule on takings plaintiffs, acknowledged that the justifications for the rule are "suspect," and suggested that this part of *Williamson County* may have been wrong. 545 U.S. at 340, 342. The Chief Justice called for the Court to reconsider the State-Litigation Rule in an "appropriate case."

This is such a case. The Supreme Court can resolve the ongoing procedural confusion by granting *certiorari* here and eliminating *Williamson County*'s prudential procedural requirements. Failure to do so may force Congress to exercise its well-established authority to regulate Federal court procedures. *See, e.g., Sibbach v. Wilson*, 312 U.S. 1, 10 (1941). Resolution now of the conflicting interpretations of *Williamson County* will aid Congress, the Subcommittee on the Constitution, and the Judiciary Committee in understanding their opportunities and obligation to protect the constitutional rights of property owners.

## CONCLUSION

This Court should resolve the conflicting interpretations of the *Williamson County* state court

requirement in a manner that will restore the rights of property owners to have a federal court adjudicate their Fifth Amendment taking claims and will provide guidance to Congress regarding the Supreme Court's understanding of the scope of constitutional protection of property rights.

August 23, 2006

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U.S. House of Representatives

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NO. 06-112

# In The Supreme Court Of The United States

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**HENRY TORROMEO and MDR CORPORATION,**
*Petitioners,*

vs.

**TOWN OF FREMONT, NEW HAMPSHIRE,**
*Respondent.*

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**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The First Circuit**

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# BRIEF OF *AMICUS CURIAE* FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF AMICUS CURIAE | 1 |
| SUMMARY OF ARGUMENT | 4 |
| REASONS FOR GRANTING THE PETITION | 5 |
| I. *WILLIAMSON COUNTY* CONTAINED A FATAL FLAW: IT WRONGLY ASSUMED THAT A 5TH AMENDMENT TAKING WITHOUT JUST COMPENSATION IS NOT COMPLETE UNTIL A STATE COURT ADJUDICATES THAT THE LOCAL AGENCY REALLY WILL NOT PAY | 5 |
| II. THE MORE RECENT DECISION IN *CITY OF CHICAGO*, RENDERED A DOZEN YEARS AFTER *WILLIAMSON COUNTY*, HAD TO HAVE A SUBSTANTIVE IMPACT ON THE "RIPENESS" PROCEDURE IN TAKINGS CASES | 14 |
| CONCLUSION | 17 |

## TABLE OF AUTHORITIES

Page

CASES:

*Bell v. Hood*, 327 U.S. 678 (1946) ..... 10

*Chicago B.&Q.R. Co. v. Chicago*, 166 U.S. 226 (1897) ..... 5

*City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) ..... 14, 15, 16, 18

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) ..... 12

*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) ..... 16

*Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ..... 16

*Felder v. Casey*, 487 U.S. 131 (1988) ..... 9, 12

*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) ..... 8, 9

*Funk v. U.S.*, 290 U.S. 371 (1933) ..... 16

*Johnson v. City of Shorewood*, 360 F.3d 810 (8th Cir. 2004) ..... 2

*Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006) ..... 2, 3

*Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir.), *cert. denied*, No. 02-1848 (2003) ..... 1, 2, 15

*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) ..... 8

*McDaniel v. Sanchez*, 452 U.S. 130 (1981) ..... 16

*Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) ..... 7

TABLE OF AUTHORITIES – Continued

Page

*Monroe v. Pape*, 365 U.S. 167 (1961) ..... 11

*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) ..... 6

*Preseault v. I.C.C.*, 494 U.S. 1 (1990) ..... 11

*San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005) ..... 1, 4, 5, 6

*Screws v. U.S.*, 325 U.S. 91 (1945) ..... 12

*SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967) ..... 16

*U.S. v. General Motors Corp.*, 323 U.S. 373 (1945) ..... 7

*Wainwright v. Sykes*, 433 U.S. 72 (1977) ..... 11

*Will v. Michigan Dept. of Police*, 491 U.S. 58 (1989) ..... 6

*Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) ..... *passim*

*Wilson v. Garcia*, 471 U.S. 261 (1985) ..... 9

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. V ..... 5, 7, 10, 13, 17

U.S. Const. Amend. XI ..... 6

U.S. Const. Amend. XIV ..... 5, 7

STATUTES:

28 U.S.C. § 1441(a) ..... 14, 15

28 U.S.C. § 2254(b) ..... 11

42 U.S.C. § 1983 ..... 6, 7, 12

42 U.S.C. § 4651 ..... 10

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 4651(1) ..... 9

42 U.S.C. § 4651(8) ..... 10

42 U.S.C. § 4655 ..... 10

OTHER:

Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urban Lawyer 671, (2004) ..... 17

Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57 (1999) ..... 9

J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209 (2003) ..... 9

Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: Public and Private Perspectives, ch. 20 (ABA 2002; Thomas E. Roberts, ed.) ..... 12

Steven J. Eagle, Regulatory Takings (2d ed. 2001) ..... 12

## BRIEF OF AMICUS CURIAE FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to the consent of the parties already filed with the Clerk of this Court, Franklin P. Kottschade submits this brief as *Amicus Curiae* in support of the Petitioners.[1]

## INTEREST OF AMICUS CURIAE

Franklin P. Kottschade is a realtor and real estate developer from Rochester, Minnesota. He has been an active leader in associations of realtors and home builders at the national, state, and local level for many years, and an active participant in charitable and community projects.

Mr. Kottschade's interest in this case stems from his own personal experiences in a similar case recently. (*Kottschade v. City of Rochester*, 319 F.3d 1038 [8th Cir.], *cert. denied*, No. 02-1848 [2003].) He also appeared as *amicus curiae* in this Court in support of the Petitioners in *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005). All of these cases

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[1] Amicus states that his counsel authored this brief and Amicus paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than Amicus made a monetary contribution to its preparation. (Supreme Court Rule 37.6.)

raise similar issues of state/federal court jurisdiction over regulatory taking cases. Counsel representing Mr. Kottschade here also represented him in both other cases.

Mr. Kottschade filed his suit directly in U.S. District Court, without attempting to "ripen" his case in state court, as described in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985). Mr. Kottschade explained that he had done so because of a concern that taking the case first to state court would ultimately deprive him of any opportunity to have his federal constitutional issues heard in federal court. The 8th Circuit Court of Appeals agreed that this concern was "justly" held (319 F.3d at 1041), although it nonetheless held that his federal case was not ripe.

Just how "justly" he held that concern has been borne out by the 8th Circuit since then. It has indeed become emblematic of the lower court confusion aptly spotlighted in the Petition. A year after it decided Mr. Kottschade's case, it reviewed *Johnson v. City of Shorewood*, 360 F.3d 810 (8th Cir 2004). There, the property owner sued first in state court. After losing there, it sought federal court relief. Relief was denied because the state proceedings precluded further action. Earlier this year, the 8th Circuit decided *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006). There, after the property owner sued in state court, the city removed it to federal court. Once in federal court,

the city moved to dismiss, on the ground that the case — which had been brought to federal court by the *defendant* — was not yet ripe for federal litigation. The 8th Circuit agreed. (435 F.3d at 903.) The system is broken, and only this Court can fix it.

The decision below bears out Mr. Kottschade's concern, and he appears here as the proverbial "Exhibit A" to the adage, "you can't get here from there." Here, because the property owners had gone to state court, the courts below held that they were *legally precluded* from pursuing *any federal claims* in federal court.

Mr. Kottschade's fear expressed to the 8th Circuit proved unfortunately predictive here. After litigating in state courts, the Petitioners were held legally unable to proceed in federal court after they "ripened" their federal case as *Williamson County* directed.

Mr. Kottschade's concern about this aspect of access to federal courts for the litigation of federal constitutional takings issues also led him recently to testify in Congress about his experiences and the law's unfairness. His testimony was presented on June 8, 2006 before the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives in support of H.R. 4772, the "Private Property Rights Implementation Act of 2005."

Mr. Kottschade thus brings to this argument his experience in trying to litigate federal constitutional takings claims in federal court. He is a living, breathing example of what is wrong with *Williamson County* as it operates in reality.

## SUMMARY OF ARGUMENT

The rule laid down in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), i.e., that a property owner does not have a "ripe" regulatory taking claim under the 5th and 14th Amendments to the United States Constitution until first seeking – and failing to obtain – redress under state law in state court, has caused jurisprudential havoc in the two decades of its existence. Even its most ardent supporters have conceded the lack of intellectual and legal soundness in its holding.

In its most recent opportunity to examine the rule, four Justices of this Court agreed that the rule is in sharp need of re-evaluation and perhaps should be discarded. (*San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 340 [2005].) It is time for the full Court to join those four and end the anarchy set loose by *Williamson County*. Mr. Kottschade urges the Court to take this opportunity to do so promptly.

## REASONS FOR GRANTING THE PETITION

### I

### *WILLIAMSON COUNTY* CONTAINED A FATAL FLAW: IT WRONGLY ASSUMED THAT A 5TH AMENDMENT TAKING WITHOUT JUST COMPENSATION IS NOT COMPLETE UNTIL A STATE COURT ADJUDICATES THAT THE LOCAL AGENCY REALLY WILL NOT PAY.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

The four concurring Justices in *San Remo* recognized this, questioning whether *Williamson County* "was correct in demanding that once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal

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2 *Chicago B.& Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

court." (*San Remo*, 545 U.S. at 340; Rehnquist, C.J., concurring.)

The *San Remo* concurrence put its finger on *Williamson County*'s flaw: *Williamson County* held that a taking is not complete until compensation is denied not just by the taking entity, but also by the state courts. No law mandates that result, and even *Williamson County*'s analysis does not support it.

*Williamson County* quite properly began with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the agency that actually committed the taking and the State that may or may not have provided a method to obtain compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like the Town of Fremont at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the town can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"[3]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[4] and nonpayment by the taker. When a municipal government — like Fremont's — conscripts private property into public service without any pretext of compensation, it violates the 5th Amendment. The

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[3] Indeed, when adopted, the 5th Amendment applied only to the federal government The 14th Amendment applied its precepts to the states, but there have been no developments in constitutional law suggesting that this provision has been *de facto* amended to exclude the federal courts from enforcing it.

[4] As explained in *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner, not the accretion of any interest to the taker, that constitutes the compensable taking.

presence or absence of a state remedy has no bearing on whether the malefactor did the deed.

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide.*" (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 [1986]; citation omitted; emphasis added.) At another point, the same opinion talks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320, fn. 10 [1987]; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated.

Deferring to state courts is tantamount to granting states a veto over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to

state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

Mandating suit in state court imports into the 5th Amendment a remedial requirement when the just compensation language is a limitation on government's inherent power, not an invitation to sue for payment,[5] and where the Just Compensation Clause is self-executing. (*First English*, 482 U.S. at 315.)

If nothing else, any required suit for payment is contrary to Congressional policy established in 1970 in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the old days of grabbing property first and then saying "sue me" to the aggrieved owner are over. That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation. Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42

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5 See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

U.S.C. § 4651[1]) or, failing that, condemnation (42 U.S.C. § 4651[8]).[6]

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff.[7]

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6 The Act provides succinctly, "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) To make this a truly "uniform" law, as its title advertised, the policies in Section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. (42 U.S.C. § 4655.)

7 *Bell v. Hood*, 327 U.S. 678, 681 (1946): "a party who brings a suit is master to decide what law he will rely upon."

Nor are other constitutional rights treated that way.[8] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant.[9] (See *Monroe v. Pape*, 365

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8 *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. (E.g., *Preseault v. I.C.C.*, 494 U.S. 1 [1990].) That is all the Petitioners (and others like them) want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

9 The lone exception is habeas corpus, where all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata and full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes*, 433 U.S. 72, 80 [1977].)

U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"]; cf. *Screws v. U.S.*, 325 U.S. 91, 108 [1945].)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)[10]

There is no need to sue in State court merely to confirm the non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit

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10 See also Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: Public and Private Perspectives, ch. 20 (ABA 2002; Thomas E. Roberts, ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

and one trip to this Court. That process consumed 13 years. At no time — even after a trial on the merits resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. The Town of Fremont was not in doubt about that claim. It simply chose not to honor it. Imposing on property owners (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown below, lower court efforts to grapple with this rule, attempting to apply it while also giving deference to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error and overrule the state court ripening requirement.

## II

## THE MORE RECENT DECISION IN *CITY OF CHICAGO*, RENDERED A DOZEN YEARS AFTER *WILLIAMSON COUNTY*, HAD TO HAVE A SUBSTANTIVE IMPACT ON THE "RIPENESS" PROCEDURE IN TAKINGS CASES.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner did as instructed by *Williamson County*: it filed a state court action challenging the validity of land use regulations. The complaint raised due process, equal protection and takings claims. (See 522 U.S. at 160.)

The Court held that it was proper for the municipal defendant to remove the case to federal court under 28 U.S.C. § 1441(a). Section 1441(a) permits removal *if, but only if*, the plaintiff could have brought suit in federal court in the first place, but chose not to. The statute gives the defendant the even-handed ability to invoke federal jurisdiction as well.

It somehow got overlooked that, as a land use plaintiff, the International College of Surgeons could *not* have sued the City of Chicago in federal court; *Williamson County* precluded it. Nonetheless, the Court held removal was proper because "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.) The Court added that "the facial and as-applied federal constitutional claims raised by ICS 'arise under'

federal law for purposes of federal question jurisdiction." (522 U.S. at 167-168.)

Justice Ginsberg's dissent emphasized *City of Chicago*'s momentous nature, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsberg, J., dissenting.)

Believing that the *City of Chicago* decision had to impact *Williamson County*, Mr. Kottschade asked the 8th Circuit to reconcile them and allow suit to proceed in federal court. After all, if the City of Chicago could remove its litigation to federal court on the ground that it could have been initiated there, then Frank Kottschade ought to be able to file suit there directly under the fair reciprocity theory underlying 28 U.S.C. § 1441(a).

The 8th Circuit acknowledged what it called an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, concluding that how to resolve the conflict "is for the Supreme Court to say, not us." (*Kottschade*, 319 F.3d at 1041.)

*City of Chicago* demonstrates the error in *Williamson County*. Unburdened by being reminded of

*Williamson County*,[11] the Court accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance.

Precedents are not cast away lightly. However, when scholars have been critical of its decisions,[12] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[13] when necessary to clarify the implications of earlier decisions,[14] when decisions of the Court are "if not directly . . . [conflicting,] are so in principle,"[15] or when "the answer suggested by [the Court's] prior opinions is not free of ambiguity,"[16] the Court has reviewed its earlier decisions and corrected its

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11 In fairness to the Court, the adversary system seems to have failed. Neither of the parties to *City of Chicago* cited *Williamson County*, and only one amicus brief even mentioned it (and that one only tangentially), so the Court was uninformed about the full consequences of its actions.

12 *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

13 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

14 *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

15 *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

16 *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

own errors. Each of those factors applies to *Williamson County*.

## CONCLUSION

*Williamson County*'s requirement of ripening 5th Amendment takings claims in state court is one of those ideas that probably sounded good at a theoretical level. As it has been applied during the past two decades, however, it has been a nightmare. It has caused needless anguish to property owners (some of whom, like Mr. Kottschade, are filing amicus curiae briefs here to share their experiences and concerns with the Court). It has caused wastefully duplicative litigation for state and federal court systems. And it has created a field day for criticism by lower courts and commentators.[17]

Citizens, lawyers, and — particularly — busy trial judges don't work at a theoretical level. Of necessity, they are concerned with nuts and bolts, rather than casuistically parsing words and theories and attempting to fit unfamiliar concepts (like the state court ripeness rule) into a matrix that already includes rules of claim and issue preclusion with which industrious trial judges work on a daily basis.

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17 A collection of colorful critiques like "absurd," "shocking," "draconian," "fraud," "hoax," and "Kafkaesque" (and many more) may be found in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urban Lawyer 671, 702-703 (2004).

It is time to call a halt to the pointless, and plainly unintended, game playing to which property owners have been subjected. They have become the shuttlecocks of constitutional litigation, subject to dismissal under *Williamson County* if they deign to file in federal court, but also subject to removal under *City of Chicago* if they file in state court and their municipal opponents would prefer a federal forum. Constitutional rights deserve better.

*Williamson County*'s state court litigation requirement needs to be overruled. It has become a jurisprudential poison pill, precluding determination of federal constitutional issues, rather than enabling meaningful decision.

Respectfully submitted,

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In The

# Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
*Petitioners,*

*v.*

TOWN OF FREMONT, NEW HAMPSHIRE,
*Respondent.*

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the First Circuit

## BRIEF AMICI CURIAE OF International Council of Shopping Centers (ICSC); National Association of Industrial and Office Properties (NAIOP); Real Estate Roundtable (RER) In Support of Petitioners

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## TABLE OF CONTENTS

**Page**

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 5

**I.** In Light Of The Court's Decisions In *Williamson County* And *San Remo,* Only State Courts Can Hear Federal Takings Claims Unless The Respondent Local Government Opts Under *City Of Chicago* To Remove The Claim To Federal Court. ..... 5

**A.** *Williamson County* Assured Ultimate Disposition of Federal Takings Claims in Federal Court. ..... 5

**B.** *San Remo* Is Inconsistent With *Williamson County's* Promise of Federal Court Adjudication of Fifth Amendment Takings Claims. ..... 11

**II.** The Court's Decisions in *Dolan* and *Lingle* Indicate That The "Shocks The Conscience" Standard Should Not Apply In Substantive Due Process Reviews Of Land Use Decisions. ..... 14

CONCLUSION ..... 20

# TABLE OF AUTHORITIES

**Page**

**Cases**

*2BD Ltd. P'ship v. County Comm'rs for Queen Anne's County*, 896 F.Supp. 518 (D.Md. 1995), *aff'd following remand*, 162 F.3d 1158 (4th Cir. 1998) ..... 17

*Agins v. City of Tiburon*, 447 U.S. 255 (1980) ..... 19

*City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997) ..... 3, 5

*City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999) ..... 16, 18

*Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988) ..... 17

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ..... 15

*DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004) ..... 6

*Dodd v. Hood River County*, 136 F.3d 1219 (1998) ..... 8

*Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) 8, 9

*Dolan v. City of Tigard*, 512 U.S. 374 (1994) ..... 15, 19, 20

*England v. Louisiana State Board of Medical Examiners et al*, 375 U.S. 411 (1964) ..... 10

*Forseth v. Village of Sussex*, 20 F.Supp.2d 1267 (E.D. Wisc. 1998), *aff'd in part, rev'd in part*, 199 F.3d 363 (7th Cir. 2000) ..... 16

**TABLE OF AUTHORITIES (CONT'D.)**

**Page**

*Good v. United States*, 39 Fed. Cl. 81 (1997), *aff'd*, 189 F.3d 1355 (1999), *cert. denied*, 529 U.S. 1053 (2000)..17

*Hadacheck v. Sebastian*, 239 U.S. 394 (1915).....15

*Healing v. California Coastal Comm'n*, 22 Cal. App. 4th 1158 (Ct. App. 1994).....17

*Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989).....17

*Kaiser Development Co. v. City and County of Honolulu*, 649 F.Supp. 926 (D. Hawaii 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).....17

*Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006).....9

*Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003), cert. denied 540 U.S. 823 (2003).....7

*Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).....14, 19, 20

*Nectow v. City of Cambridge*, 277 U.S. 183 (1928).....19

*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).....19, 20

*Owen v. City of Independence*, 445 U.S. 622 (1980).....18

*Penn Central Transportation Co. v. New York City* (438 U.S. 104).....12

*Pennsylvania Coal v. Mahon* (260 U.S. 393).....12

**TABLE OF AUTHORITIES (CONT'D.)**

**Page**

*Rapanos, et. al. v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006).....16

*River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994).....17

*San Remo Hotel, L.P. v. San Francisco City and County*, 545 U.S. 323 (2005).....passim

*Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623 (5th Cir. 2003).....9

*Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d Cir. 2003).....9

*Schulze v. Milne*, 849 F.Supp. 708 (N.D.Cal. 1994), *aff'd in part, rev'd in part on other grounds*, 98 F.3d 1346 (9th Cir. 1996).....17

*Southview Assocs. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993).....17

*Torromeo, et al. v. Town of Fremont, New Hampshire*, 438 F.3d 113 (1st Cir. 2006).....14

*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).....10

*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).....15

*Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 (10th Cir. 1998).....7

## TABLE OF AUTHORITIES (CONT'D.)

**Page**

*Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) .....passim

**Statutes**

42 U.S.C. § 1983 .....18

**Other Authorities**

Berger, Michael & Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 THE URB. LAW. 671 (2004) ..6, 12

Berger, Michael, *Choice of Forum: A Bit of Ripeness History*, ALI-ABA Land Use Institute Vol. II, Page 1407 (2006).....6, 7

Blaesser, Brian, *Closing the Federal Courthouse Door on Property Owners*, 2 HOFSTRA PROP. L.J. 73 (1988) .....18

Breemer, J. David, *You Can Check Out But You Can Never Leave: The Story Of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims To State Courts Under a Rule Intended to Ripen The Claims For Federal Review*, 33 B.C. Envtl. Affairs Law Rev. 247.....6, 12

Cobb, Rodney L., *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U. J. L. & Pol'y 195 (2000) ....16

Delaney, John and Desiderio, Duane, *Who Will Clean Up The 'Ripeness Mess'? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse*. 31 THE URB. LAW. 195 (Spring, 1999).....18

## TABLE OF AUTHORITIES (CONT'D.)

**Page**

Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights,* 29 CAL. WESTERN L. REV. 1 (1992) .....18

Mandelker Testimony, 31 THE URB. LAW. 234, at 237 (Spring, 1999).....8, 15

Meacham, Madeline J., *The Williamson Trap*, 32 THE URB. LAW. 239 (2000).....6, 7, 8

Overstreet, Gregory, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. LAND USE & ENVT'L L. 91 (1994) .....18

**Rules**

Rule 37.6 of the Rules of the Court .....1

## INTERESTS OF THE AMICI CURIAE[1]

Written consent has been filed with the Clerk of the Court allowing the amici listed herein to submit this brief in support of the Petitioners.

The *amici* are a coalition of trade associations whose membership shares a common interest in the protection of private property rights safeguarded by the Takings Claims of the Fifth Amendment. Accordingly, the *amici* are concerned with any judicial decision that calls into question the "just compensation" remedy available under the U.S. Constitution to its members. In this case, their interest is heightened by the basic, fundamental, jurisdictional issue at play: When their members suffer an uncompensated taking as a result of government actions, can they ever vindicate those types of federal constitutional claims in a federal court?

Founded in 1957, the International Council of Shopping Centers (ICSC) is the global trade association of the shopping center industry. Its more than 61,000 members in the U.S., Canada, and more than 80 other countries represent owners, developers, retailers, lenders, and other professionals as well as academics and public officials. Shopping centers are America's marketplace, representing economic growth, environmental responsibility, and community strength. ICSC supports strong protections for property owners. Indeed, ICSC could scarcely exist

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[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned Counsel of Record certifies that he authored this Brief in its entirety; that it was not written in whole or in part by counsel for a party; and that no one, other than the amici curiae, has made a monetary contribution to its preparation or submission.

without the certainty provided by property rights and property-related contractual rights.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading trade association for developers, owners, investors and other professionals in industrial, office and mixed-use commercial real estate. Founded in 1967, NAIOP comprises 13,000+ members in 52 North American chapters. NAIOP provides communication, networking and business opportunities for all real estate professionals; provides a forum for continuing education; and promotes effective public policy, through its grassroots network, to create, protect and enhance property values.

The Real Estate Roundtable ("RER") is the organization that brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms, with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. Collectively, RER members hold portfolios containing over 3.5 billion square feet of developed property valued at more than $300 billion. The RER has long advocated that the implementation of local, state and federal laws be more sensitive to the constitutional property rights of private citizens, and that adequate remedies be available when those rights are violated.

## SUMMARY OF ARGUMENT

This case is about federal court access and procedural fairness. The Court is not asked to decide whether Henry Torromeo and MDR Corporation ("Petitioners") must be compensated for the taking that is alleged, but simply whether that issue is ripe for resolution in federal court.

The Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), was clear in stating that Fifth Amendment takings claimants who were required to use "state procedures" to determine whether compensation was available, and were denied relief, could then ask a federal court to validate their federal takings claim. Nothing in *Williamson County* warranted the conclusion that *only state courts* could be utilized as the forum for determining whether an adequate post-deprivation remedy for a property loss exists under state law. Federal courts routinely become involved in reviewing actions of local governments in other constitutional contexts, and the treatment of Fifth Amendment takings claims should be no different. When local land use decisions are challenged on takings grounds, no basis exists to exclude federal courts from determining whether compensation has been paid, or examining whether state procedures for obtaining compensation from local governments are adequate or have been exhausted.

However, initial expectations arising from *Williamson County* were quickly dashed as zoning bodies and lower courts across the country abused or misapplied the Court's decision by fabricating additional obstacles, such as ripeness, claim preclusion and issue preclusion, to prevent judicial review of the merits of a takings claim. These actions have caused concrete deprivations of property rights. Clearly, the *Williamson County* Court did not intend that the doors of the federal courthouse be slammed shut only on plaintiffs alleging a taking under the Fifth Amendment, while (1) municipal defendants in such cases retain the option of defending takings claims in either federal or state court, *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), and (2) plaintiffs with other

constitutional claims are allowed reasonable and immediate access to the federal courts.

As a result of the Court's recent decision in *San Remo Hotel, L.P. v. San Francisco City and County*, 545 U.S. 323 (2005), virtually all Fifth Amendment takings claims must be brought in state courts. Expectations still lingering from *Williamson County* that property owners could validate their Fifth Amendment takings claims in federal court were extinguished. Significantly, four concurring Justices in *San Remo* suggest convincingly that *Williamson County* may not have been correctly decided; that its requirement that takings claimants must seek compensation in a state court before bringing a federal takings claim in federal court may be only a prudential requirement in the first place; and that while state courts are competent to adjudicate federal takings claims, there is no basis why such claims should be "singled out to be confined to state court". 545 U.S. at 342 (Rehnquist, C.J., concurring). *Williamson County*'s ripeness requirement cannot be reconciled with *San Remo*, nor can it be reconciled with the laws of issue and claim preclusion.

Additionally, the Court of Appeals applied a "shocks the conscience" standard of review in this Fifth Amendment deprivation case. A proper understanding of the extensive power of local governments over private property and the pervasive impact of such power upon constitutionally protected property rights would strongly suggest that the shocks the conscience standard is inappropriate in substantive due process review of local government decisions in land use cases. The lower federal courts are split on this issue.

For these reasons, it is imperative that certiorari be granted.

## ARGUMENT

### I. IN LIGHT OF THE COURT'S DECISIONS IN *WILLIAMSON COUNTY* AND *SAN REMO*, ONLY STATE COURTS CAN HEAR FEDERAL TAKINGS CLAIMS UNLESS THE RESPONDENT LOCAL GOVERNMENT OPTS UNDER *CITY OF CHICAGO* TO REMOVE THE CLAIM TO FEDERAL COURT.

#### A. *Williamson County* Assured Ultimate Disposition of Federal Takings Claims in Federal Court.

Before the Court decided *San Remo*, it was widely believed that the Court in *Williamson County* contemplated that citizens alleging Fifth Amendment regulatory takings claims against a local government in a federal court could *return* to the federal court after ripening their claim by seeking compensation "through the procedures the state has provided" for such purposes, 473 U.S. at 194. In *Williamson County*, the applicable state procedure was an action for inverse condemnation under Tennessee law, 473 U.S. at 196. The Court expressly held that a property owner "cannot claim a violation of the Just Compensation Clause" *until* it has used the [state's] procedure and been denied just compensation." 473 U.S. at 195 (emphasis supplied). The Court repeatedly stated that the owner's claim was "premature" and thus "not yet ripe" for adjudication in a federal court "until" the state "fails to provide adequate compensation for the taking."[2]

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[2] *Williamson County* at 195. In describing the Justices clear intent that the claimant could return to the federal court, the Court's opinion and concurring opinion used the word "premature" six times (at 473 U.S. 185, 195, 197, 199, 200, and 201) and "until" five times (at 186,

*Williamson County* left little doubt that a takings claim that is unripe for adjudication in a federal court could later be ripened for future adjudication in that court "after disposition in the state court."[3] Its phraseology created an "expectation…that an unsuccessful state plaintiff will then return to federal court."[4]

Practitioners and scholars have shared this view.[5] Unfortunately, to the consternation of property owners, attempts to follow *Williamson County* have not succeeded. This has been due primarily to the confusion and chaos arising in lower federal courts when weighing *Williamson County's* directives against doctrines of claim preclusion (res judicata) as in the instant case, and issue preclusion (collateral estoppel).[6]

As compellingly described in the Petition For A Writ of Certiorari ("Petition"), the result has been what is often

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195, and 197). The phrase "not yet ripe" was used both in the main opinion (473 U.S. at 194) and in Justice Stevens concurring opinion (473 U.S. at 203).

[3] Madeline J. Meacham, *The Williamson Trap*, 32 THE URB. LAW. 239, 249 (2000).

[4] *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004).

[5] *See, e.g.*, J. David Breemer, *You Can Check Out But You Can Never Leave: The Story Of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims To State Courts Under a Rule Intended to Ripen The Claims For Federal Review*, 33 B.C. Envtl. Affairs Law Rev. 247, 283-284, n. 260 and accompanying text (2006); hereinafter "*You Can Check Out But You Can Never Leave.*"

[6] *See* generally Michael Berger, *Choice of Forum: A Bit of Ripeness History*, ALI-ABA Land Use Institute Vol. II, Page 1407 (2006); Michael Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 THE URB. LAW. 671 (2004).

described as "the Williamson Trap."[7] Where as in this case, property owners follow *Williamson County* by seeking compensation in a state court in order to ripen their federal claim and lose, that claim has instead been entirely extinguished. Just as a federal takings claim filed "before state court litigation" is "too early," a federal claim brought "after state litigation" [as here] is too late.[8]

The reaction of federal appellate courts to this phenomenon has ranged from sympathetic rejection of the property owners' efforts to gain a hearing on the merits of their federal claims, to almost callous disregard for their predicament. For example in *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003), cert. denied 540 U.S. 823 (2003), the Court of Appeals acknowledged that Mr. Kottschade's arguments are "justly" stated; that the combination of the state remedies exhaustion requirement and the barriers to federal jurisdiction thereafter facing compliant landowners may be "anomalous;" but concluded that whether and how the problem should be addressed, "is for the Supreme Court to say, not us." *Kottschade*, at 1041.[9]

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[7] Petition, pg. 8.

[8] Petition, pg. 8, citing Madeline J. Meacham, *The Williamson Trap, supra*, Footnote 3. See also: Berger, *Choice of Forum: A Bit Of Ripeness History, supra*, Footnote 6.

[9] Similarly, in *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n.4, (10th Cir. 1998), the court in applying preclusion doctrines to bar a takings claim, stated that *Williamson County's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims . . . . It is difficult to reconcile the ripeness requirement of *Williamson County* with the laws of [issue and claim preclusion]. *Wilkinson*, 142 F.3d at 1325, n.4.

Indeed, this was a problem that the distinguished Professor Daniel R. Mandelker envisioned almost a decade ago:

> [E]ven if the property owner strictly adheres to *Williamson County*, her failure to raise a *federal* constitutional claim in *state* court could destroy her chances of ever having a federal judge address the Fifth Amendment claim. I do not think that property owners should be forced to litigate federal takings claims in State court, yet this is the ironic effect of the synergy between ripeness and res judicata.[10]

In *Dodd v. Hood River County*, 59 F.3d 852, 860-861 (9th Cir. 1995) ("*Dodd I*"), the Court of Appeals rejected the County's claim preclusion argument, stating:

> [To] hold that a takings plaintiff must first present a Fifth Amendment claim to the state court system ... would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revoluntionary concept and draconian result.

However, in a subsequent appeal by the Dodds, *Dodd v. Hood River County,* 136 F.3d 1219, 1224-1228 (1998) (emphasis supplied) (*Dodd II*), the Ninth Circuit sprung the *Williamson County* trap by holding that while the *Dodds* could reserve their claim for federal court the reservation doctrine did not enable them to "avoid preclusion of *issues* actually litigated" in the state court.

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[10] Daniel R. Mandelker, Testimony Before House Judiciary Committee, Sept 23, 1997, 31 THE URB. LAW. 234, at 251 (1999).

In *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 127, 130 (2d Cir. 2003), the Court of Appeals disagreed with the Ninth Circuit's decision in *Dodd II*, and attempted to implement what it believed was the clear intent of *Williamson County*. After finding that claim preclusion was inapplicable because *Santini* could not have brought a Fifth Amendment takings claim in an earlier state court action, the court declined to apply issue preclusion, stating:

> It would be both ironic and unfair if the very procedure that the Supreme Court required *Santini* to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded *Santini* from ever bringing a Fifth Amendment takings claim. (342 F.3d at 130).

However, the *San Remo* Court resolved the conflict between *Santini* and *Dodd II* in favor of the more tortured logic of *Dodd II*.[11]

Other federal courts have expressed few qualms about dismissing federal takings claims for lack of jurisdiction even in cases where the property owners filed their initial suit in state court as directed by *Williamson County*, only to be forced into a federal court by the local governments' removal motions. *See e.g., Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003). The Amici share the concerns of the Petitioners (Petition, page 16) that such practices are unfair, far beyond the pale, and require intervention by the Court.

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[11] *San Remo*, 545 U.S. at 326-327.

The "right of access to the courts" has been described by this Court as a "fundamental right guaranteed by the Constitution." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974). Surely, this cannot mean that for citizens asserting Fifth Amendment takings claims, this fundamental right extends only to review by state courts. Yet that is exactly what has happened in the wake of *Williamson County* and its progeny in lower federal courts. Federal judges routinely cite *Williamson County's* ripeness requirements in rejecting takings claims.[12]

Three decades ago, in *England v. Louisiana State Board of Medical Examiners et al,* 375 U.S. 411, 415 (1964), Justice William Brennan stated:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.

Federal judges should review constitutional challenges to local government actions in the land use area, just as they review local government infringements upon other privileges in the Bill of Rights.

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[12] This is due primarily to the fact that they interpret *Williamson County's* "state procedures" language as requiring landowners to first litigate their takings claims in state courts. As noted by Chief Justice Rehnquist in his concurring opinion in *San Remo*, (545 U.S. at 340), discussed *infra* in Argument IB, this is not at all clear.

### B. *San Remo* Is Inconsistent With *Williamson County's* Promise of Federal Court Adjudication of Fifth Amendment Takings Claims.

*San Remo* drastically modifies *Williamson County's* promise of ultimate federal court adjudication of takings claims. The Court characterizes the Hotel's claimed right "right to vindicate [its] federal claims in a federal forum" as a mere "assumption," 545 U.S. at 336, and in so doing has created additional confusion. As discussed in Argument IA, *Williamson County* has been understood to mean that despite the requirement that a takings claimant first ripen its claim in state court *before* it may proceed in a federal court, the federal court would remain available for ultimate adjudication of such a claim. To the contrary, *San Remo* holds that "issues actually decided in valid state court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court". 545 U.S. at 336.[13] Further, *San Remo* states that *Williamson County's* requirement that "aggrieved property owners must seek compensation through the procedures the state has provided for doing so does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that in the alternative the denial of compensation would violate the Fifth Amendment of the Federal Constitution." 545 U.S. at 338.

*San Remo* has been heavily criticized. For example, its statement that there is "scant precedent" for litigation in

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[13] In their state court complaints the Petitioners made only a single reference to the Federal Takings Clause. They never had an opportunity under New Hampshire law and First Circuit precedent to litigate their Fifth Amendment claim in state court. *See* Petition, pgs. 3-4, 13-14, and particularly 19-20.

federal district courts of takings claims arising from actions of state agencies (545 U.S. at 339) is strongly questioned by one commentator:

> "Between June 26, 1978--the date the Court decided *Penn Central Transportation Co. v. New York City* (438 U.S. 104) which provided the modern regulatory takings test--and June 28, 1995--the date the Court issued *Williamson County*--there were approximately 141 federal district court cases involving federal takings claims against regulation. By contrast, there were just 109 similar state court cases. . . In the period between 1992--the year *Pennsylvania Coal v. Mahon* (260 U.S. 393) was decided--and 1978, there were approximately 174 more instances of litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's 'takings clause'."[14]

The commentator concludes that, "thanks to *San Remo*, the irredeemably flawed and unnecessary state procedures requirement has conspired with preclusion to make federal claims for just compensation federally homeless."[15]

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[14] Breemer, *You Can Check Out But You Can Never Leave*, *supra*, Note 5, 33 B.C. Envtl. Affairs Law Rev. 247, at 286-287. Similarly *San Remo's* observation that "most" Supreme Court takings cases have arisen from state courts since 1978 is challenged by the assertion that the Court has taken 19 major cases arising from federal district courts during this period, compared to only 14 from state courts. *Id.* For an extended listing of other articles critical of *Williamson County's* state compensation procedures requirement, *see* p. 248, Note 3 of Mr. Breemer's treatise.

[15] *Id.* at 299. *See also* Berger and Kanner, *supra*, Note 6.

The late Chief Justice William Rehnquist, joined by Justices O'Connor, Kennedy and Thomas, wrote a concurring opinion in *San Remo* questioning whether *Williamson County* was correct in demanding "that once a government entity has reached a final decision regarding a claimant's property, the claimant "must" seek compensation in a state court before a federal takings claim in federal court". 545 U.S. at 340. The concurring opinion suggests that this may be "merely a prudential requirement," and that neither "constitutional nor prudential principles" required the claimant to embark upon such a course. 545 U.S. at 340-341. Moreover the concurring opinion questions why authority over federal takings claims should be handed to state courts, based simply on their "relative familiarity" with local land use decisions and proceedings, while allowing plaintiffs who challenge municipal land use regulations based upon the First Amendment or the Equal Protection Cause to "proceed directly to federal courts". 545 U.S. at 341. The concurring opinion notes that *Williamson County's* "state litigation rule has created some real anomalies" justifying revisiting the issue. One of these is the *San Remo* ruling that litigants who do go to state court to seek compensation "will likely be unable later to assert their federal takings claims in federal court." 545 U.S. at 342. The concurring Justices then identify the central problem:

> *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound. . . and would apply to any number of federal claims...But that principle does not explain why federal takings claims in

> particular should be *singled out to be confined to state court*, in the absence of any asserted justification or congressional directive. 545 U.S. at 342 (emphasis supplied).

Chief Justice Rehnquist thereupon acknowledges that he joined the opinion of the Court in *Williamson County*, but that further reflection and experience have led him to think that:

> [T]he justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts. 545 U.S. 342.

The Amici respectfully submit that the Petitioners have presented Chief Justice Rehnquist's "appropriate case" to the Court.

## II. THE COURT'S DECISIONS IN *DOLAN* AND *LINGLE* INDICATE THAT THE "SHOCKS THE CONSCIENCE" STANDARD SHOULD NOT APPLY IN SUBSTANTIVE DUE PROCESS REVIEWS OF LAND USE DECISIONS.

In response to the Petitioners' substantive due process claim, the Court of Appeals in *Torromeo, et al. v. Town of Fremont, New Hampshire*, 438 F.3d 113, 118 (1st Cir. 2006), held that there are "limits" when such claims arise from "land use disputes" and thus, the Petitioner's claim that the Town's actions have caused them harm was not enough to "shock the conscience" of the court so as to rise

to the level of a "constitutional deprivation." (*Id.*)[16] As noted in the Petition, lower federal courts are applying different and conflicting due process standards to deprivations of property. Several circuits – now joined by the First Circuit – are using the shocks the conscience standard without explaining why it is more appropriate than the "rational relationship" test. (Petition, pp. 23-27).

The Amici agree that there is conflict among the circuits which needs to be resolved by the Court, and submit that the shocks the conscience standard should have no place in evaluating deprivation of property claims arising from local land use decisions. Local governments have been deeply involved in land use planning and regulation for nearly a century, before the Court's first decisions upholding local zoning ordinances against due process challenges, and well before the standard planning enabling acts in the 1920s.[17] This is far longer than their counterparts in the state and federal governments whose meaningful experience didn't begin until the 1970s following passage of federal environmental laws. An extensive, well-developed body of jurisprudence regarding zoning, subdivision and numerous related areas of land use is available to the courts.[18] To this

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[16] As stated by the Petitioners, this Court has never applied the shocks the conscience standard in a property rights case, but did use it in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), a far cry from the case at bar, which held that a police officer involved in an automobile accident while engaged in a hot pursuit did not violate the due process right to life of the decedent.

[17] *See e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); Daniel R. Mandelker, LAND USE LAW, 5th Ed., Sections 3.01-3.05, Lexis-Nexis 2003.

[18] Compare e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 390-391 (1994) (where the Court relied upon decades-old precedents from several

day, primary responsibility for *land use planning and regulation* remains vested in local governments. Each and every week local governments take action on countless numbers of *building permits*, still the Holy Grail of all development approvals. More than any other level of government, local governments usually have the final say on how a specific parcel of land will ultimately be developed and used. They wield enormous power and have the most pervasive impact upon property rights. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), exemplifies how this power can be and often is abused.[19] While the property owners in *City of Monterey* ultimately prevailed, the land use labyrinth they were forced to navigate is by no means unique.[20]

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states in developing the "rough proportionality" standard for regulatory exactions), to *Rapanos, et. al. v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006) (where federal agency interpretations of "waters of the United States" and "navigable waters" continue to defy consensus).

[19] In *City of Monterey*, the developer submitted 19 different site plans and numerous applications over a period of years in a futile effort to obtain approval. Nine years had elapsed between submission of the first plan to a lower court's decision that the claim was ripe, without ever reaching the merits. Eight more years of litigation on the merits followed before the Supreme Court reviewed the case.

*See also* Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U. J. L. & Pol'y 195 (2000). Mr. Cobb was, for many years, Staff Counsel for the American Planning Association and was also Editor of LAND USE LAW AND ZONING DIGEST.

[20] The following cases involve multiple submissions of development plans, and lengthy agency reviews (often taking many years) culminating in dismissal of court challenges on ripeness grounds. *Id.* at 7-21: *Forseth v. Village of Sussex*, 20 F.Supp.2d 1267, 1272 (E.D. Wisc. 1998), *aff'd in part, rev'd in part*, 199 F.3d 363, 366 (7th Cir. 2000); *Good v. United States*, 39 Fed. Cl. 81, 101-103 (1997), *aff'd*,

In view of the devasting impact that local zoning and permitting actions can have on basic property rights, the hostile and elitist attitude exhibited by some federal courts when reviewing constitutional claims arising from these actions is astonishing.[21] The message conveyed is that the myriad local land use decisions — the decisions that most often deprive citizens of their property — are not worthy of federal constitutional review, no matter how implausible.[22]

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189 F.3d 1355 (1999), *cert. denied*, 529 U.S. 1053 (2000); *2BD Ltd. P'ship v. County Comm'rs for Queen Anne's County*, 896 F.Supp. 518 (D.Md. 1995), *aff'd following remand*, 162 F.3d 1158 (4th Cir. 1998); *Schulze v. Milne*, 849 F.Supp. 708, 709 (N.D.Cal. 1994), *aff'd in part, rev'd in part on other grounds*, 98 F.3d 1346 (9th Cir. 1996); *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Kaiser Development Co. v. City and County of Honolulu*, 649 F.Supp. 926, 940, 941 n. 19, 942 n. 21 (D. Hawaii 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991). State courts often emulate federal courts regarding finality and ripeness. A California state case typifies the situation that landowners can confront when seeking development approvals from state and local official, *e.g.*, *Healing v. California Coastal Comm'n*, 22 Cal. App. 4th 1158 (Ct. App. 1994).

[21] For example, even though constitutional property rights issues were at stake, one appellate court proclaimed that "federal courts are not boards of zoning appeals." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994). Another, in dismissing a takings claim, was concerned that it be perceived as "the Grand Mufti of local zoning boards." *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). Yet another characterized the takings claim before it as merely "a garden variety zoning dispute dressed up in the trappings of constitutional law." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

[22] For example, in *Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S. Ct. 1549, certiorari denied, (2000), the owners of a 58-unit hotel claimed that the imposition of a $600,000 "replacement fee" as a condition of approval to convert 24 residential units in the hotel to "tourist units" was a violation of the essential nexus and

These attitudes encourage agencies to make arbitrary decisions and manipulate the process. Intimidated applicants are often ping-ponged from agency-to-agency, or between agency and courts in a futile quest for a "final" decision that is "ripe" for judicial review. This is inconsistent with prior rulings of the Court that local governments are not immune from liability in 42 U.S.C. Section 1983 actions such as those in the instant case.[23] The federal courts' avoidance of takings claims is a particular subject of analysis.[24]

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rough proportionality requirements of *Nollan* and *Dolan*. The state appellate court found no such violation, holding that the fact that the planning commission "might have granted the permit upon payment of $600,000 does not make its refusal to issue the permit into a taking." 529 U.S. at ___, 120 S. Ct. 2t 1551 . Justices Scalia, Kennedy and Thomas in dissent found this reasoning to be "so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal," and that "there is reason to believe that this may be more than a local and isolated phenomenon." *Id.* (citations omitted).

[23] *See, Owen v. City of Independence*, 445 U.S. 622 (1980). In *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 707 (1999), the Court rejected this notion: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim …."

[24] *See*, Notes 5 and 6 *supra*. *See also, e.g.*, Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVT'L L. 91 (1994); Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. WESTERN L. REV. 1 (1992); Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners*, 2 HOFSTRA PROP. L.J. 73 (1988); J. Delaney and D. Desiderio, *Who Will Clean Up The 'Ripeness Mess'?*

If the unique power of local governments over the use of land and the abuses thereof were properly understood, few courts would apply the "shocks the conscience" standard in a substantive due process analysis of a local land use decision. Moreover, the Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), has already spoken in part on this issue. *Dolan* articulated an elevated standard, the "rough proportionality," test (512 U.S. at 391), when regulatory conditions or exactions are attached to a development approval, while placing the burden of proof upon the government – not the property owner – to show that rough proportionality existed between the exaction and the burden imposed by the development, 512 U.S. at 391.

Further, *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 544 (2005), clarified that the "substantially advances a legitimate state interest test "espoused in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) ("*Agins Prong I*") was doctrinally untenable in takings cases. The Court further ruled that *Dolan* and its companion case, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), "are better understood as involving a special application of the 'doctrine of unconstitutional conditions,'" (544 U.S. at 547), namely that the government may not require a person to give up a constitutional right when property is taken for a public use "in exchange for a discretionary benefit conferred by the government where the benefit has little or no relation to the property," 544 U.S. at 457.

*Agins Prong I* was originally promulgated based on *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a due

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*A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse.* 31 THE URB. LAW. 195, 203-204 (Spring, 1999).

process case. *Lingle* suggests that due process standards (including a means-ends test) rather than takings tests will be applied in future cases involving unconstitutional conditions attached to development approvals, (544 U.S. at 542). In such cases, the rough proportionality test might be appropriate. Again there would appear to be no need or justification for applying the "shocks the conscience" standard of review. Moreover, *Lingle* characterized both *Nollan* and *Dolan* as involving dedications of property "so onerous that outside the exactions context they would be deemed *per se* physical takings" (544 U.S. 547), thus obviating the need for substantive due process review, with or without the "shocks the conscience" standard.

In summary as noted by the Petitioners, notwithstanding the appellate court's imposition of a harsh "shocks the conscience" standard of review in this Fifth Amendment deprivation of property rights case, no national standard yet exists. Thus, clarification by the Court is much needed.

## CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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HENRY TORROMEO and MDR CORPORATION,
*Petitioners*,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
*Respondent.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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# PETITIONERS' REPLY

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## QUESTIONS PRESENTED

The Respondent recharacterizes Petitioners' questions presented, so they bear repeating:

In *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), four concurring Justices stated this Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), "may have been mistaken," because "[i]t is not clear ... that *Williamson County* was correct in demanding that ... the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 545 U.S. at 340.

1. **Must a takings claimant first seek and be denied compensation in state court, before bringing a federal takings claim in federal court?**

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005), this Court held that the "failure to substantially advance a legitimate government interest" formula from *Agins v. City of Tiburon,* 447 U.S. 255 (1980), "has no proper place in our takings jurisprudence" because it "prescribes an inquiry in the nature of a due process ... test ...." *Lingle,* 544 U.S. at 540. The lower federal courts are widely split over the standard of liability for a deprivation of property without due process.

2. **What is the proper standard of liability for a deprivation of property without due process?**

## TABLE OF CONTENTS

Page(s)

**QUESTIONS PRESENTED** ..... i

**TABLE OF CONTENTS** ..... ii

**TABLE OF AUTHORITIES** ..... iii

**I. THIS PETITION PRESENTS A QUESTION OF JURISDICTION OVER FIFTH AMENDMENT TAKINGS CLAIMS, NOT *RES JUDICATA*** ..... 1

A. Petitioners' Fifth Amendment Claims did not Exist in the State Proceedings, and Thus the State Court Could not Have Possibly Decided Them ..... 1

B. Because Petitioners' Fifth Amendment Claims did not Exist in the Prior State Action, *Res Judicata* Could not Have Barred Them in the Subsequent Federal Action ..... 3

C. The Record Belies any Assertion That Petitioners Litigated Fifth Amendment Claims in State Court ..... 5

D. Respondent's Issue Preclusion Argument is Smoke and Mirrors ..... 8

E. The Petition Places *Williamson*'s State-Litigation Rule Front and Center ..... 9

**II. THE STANDARD FOR DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS MUST BE CLARIFIED** ..... 10

**CONCLUSION** ..... 10

## TABLE OF AUTHORITIES

Page(s)

**CASES**

*Bauknight v. Monroe County*, 446 F.3d 1327 (11th Cir. 2006) ..... 9

*Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971) ..... 8

*Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989) ..... 2

*City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997) ..... 9

*Deniz v. Mun. of Guaynabo*, 285 F.3d 142 (1st Cir. 2002) ..... 2

*First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) ..... 7

*Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991) ..... 1-2

*Kontrick v. Ryan*, 540 U.S. 443 (2004) ..... 5

*Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003), *cert. denied*, 540 U.S. 825 (2003) ..... 9

*Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006) ..... 9

*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) ..... 10

*McKinnon v. Kwong Wah Rest.*, 83 F.3d 498 (1st Cir. 1996) ..... 8

*Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003) ..... 4-5

*Pascoag Reservoir & Dam LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003) ..... 2

## TABLE OF AUTHORITIES

*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) ..... 6

*San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), 125 S.Ct. 2491 (2005) ..... *passim*

*Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) ..... 4

*State v. Ball*, 471 A.2d 347 (N.H. 1983) ..... 6

*Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) ..... 5

*United States v. Mendoza*, 464 U.S. 154 (1984) ..... 4

*Whitmore v. Arkansas*, 495 U.S. 149 (1990) ..... 5

*Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) ..... *passim*

*Wisc. Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998) ..... 5

## OTHER

42 U.S.C. § 1983 ..... 7

Brief of Respondent, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (No. 04-340) ..... 8

Restatement (Second) Judgments § 26(1)(c) (1982) ..... 4

## I. THIS PETITION PRESENTS A QUESTION OF JURISDICTION OVER FIFTH AMENDMENT TAKINGS CLAIMS, NOT *RES JUDICATA.*

Whether *Williamson*'s state-litigation rule, as modified by *San Remo*'s simultaneous claims rule, bars the lower federal courts from *ever* adjudicating Fifth Amendment takings claims is an "important federal question," Sup. Ct. R. 10, which the Petition squarely presents. Respondent Town of Fremont attempts to pitch this case as simply turning on a state law issue of *res judicata*. Opp. 9-11. The Court should avoid that diversion. Whether the court of appeals properly applied claim preclusion depends precisely on whether Petitioners had a ripe federal takings claim for the state court to adjudicate. That, in turn, depends on *Williamson* and *San Remo*. If there was no federal takings claim in state court then claim preclusion is irrelevant, *regardless* of Petitioners' state court pleadings and citations. Only this Court can definitively resolve the conflict between its two leading opinions addressing federal jurisdiction over Fifth Amendment takings claims.

### A. Petitioners' Fifth Amendment Claims did not Exist in the State Proceedings, and Thus the State Court Could not Have Possibly Decided Them.

As of 2000-2002 when Petitioners were in state court, both the First Circuit and the New Hampshire Supreme Court had unequivocally interpreted *Williamson* to mean that, as a matter of law, a Fifth Amendment takings claim *did not exist* until a state inverse condemnation suit ended and compensation was denied. Accordingly, under entrenched, widespread, and nearly unanimous lower court interpretations of *Williamson*, it was legally impossible for Torromeo and MDR to have brought Fifth Amendment claims in their state action.

In *Gilbert v. City of Cambridge,* 932 F.2d 51 (1st Cir.), *cert. denied,* 502 U.S. 866 (1991), the court of appeals

upheld a dismissal under Fed. R. Civ. P. 12(b)(6)—for failure to state a *claim*—because the property owners did not first repair to state court seeking compensation for inverse condemnation. *Id.* at 53. "*Williamson*, 473 U.S. at 194 n. 13 ... leaves no doubt that, so long as the State provides an adequate process for securing compensation, federal ... intervention in advance of resort to that procedure is premature." *Gilbert*, 932 F.2d at 64.

In *Deniz v. Mun. of Guaynabo*, 285 F.3d 142 (1st Cir. 2002), the court of appeals upheld a motion to dismiss Section 1983 takings and due process claims under Fed. R. Civ. P. 12(b)(1)—*for lack of jurisdiction*—due to lack of a prior state ripening suit. *Id.* at 144. Citing *Williamson*, the court wrote: "Thus, a takings claim ordinarily is considered unripe if the claimant comes directly to a federal court without first seeking compensation through state procedures." *Id.* at 146. The plaintiff was required to initiate litigation in the Puerto Rico courts, even though the Commonwealth had not yet made available an inverse condemnation remedy. *Id.* at 147.

In *Pascoag Reservoir & Dam LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), the court of appeals again upheld a finding that the property owners "fail[ed] to state a claim" (*id.* at 89), because they did not first bring an inverse condemnation action in the Rhode Island courts. "*Williamson County* requires the pursuit of state remedies *before* a taking case is heard in federal court." *Id.* at 94 (emphasis supplied).

Even prior to any of the First Circuit's holdings, in *Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989), the New Hampshire Supreme Court had interpreted *Williamson* to prohibit state court jurisdiction over simultaneous state and federal takings claims. It found dismissal of a property owner's Section 1983 claims "was appropriate" because "it has fulfilled neither of *Williamson*'s conditions ...." *Id.* at 506.

Respondent's Opposition does not cite, much less analyze, any of these cases. Yet the Town cavalierly insists that "petitioners asserted both state and federal takings

claims in the state-court action." Opp. 11. How could this be, if Petitioners' federal claims did not yet exist while the state law claims were being litigated in state court? Surely, if Petitioners had raised Fifth Amendment takings claims in the state proceedings, the Town would have immediately moved to dismiss for failure to state a claim and/or lack of jurisdiction, or the state court would have acted *sua sponte*, following *Williamson, Gilbert, Blue Jay Realty*, and the law of just about every other circuit. See Pet. 8, n. 3.

Likewise, the salient point of these precedents—that *Williamson* makes it impossible to raise federal claims in an initial state action—escaped all scrutiny by the court of appeals. App. 6a-9a. It was wrong on the law to even address, much less decide, whether Petitioners "actually litigated" federal claims in state court. App. 7a.

It is difficult, if not impossible, to reconcile the pervasive interpretations of *Williamson* as deferring federal jurisdiction over Fifth Amendment claims, with *San Remo*'s directive that federal *and* state takings claims may be brought "simultaneously" in state court. *San Remo*, 545 U.S. at 338. Of course, *San Remo* had not yet been decided when Petitioners filed their state suits for compensation in 2000; only *Williamson* and its First Circuit and New Hampshire progeny were in effect. Whether *San Remo* has now overruled all of these cases, and whether *San Remo* can somehow be reconciled with *Williamson*, are questions for this Court to answer—and are presented by the court of appeals's decision. This is why a plurality of Justices concurred that the state-litigation rule "has created some real anomalies," "may have been mistaken," and should be "revisit[ed]." *San Remo*, 545 U.S. at 340. The Court may do so by granting the Petition.

**B. Because Petitioners' Fifth Amendment Claims did not Exist in the Prior State Action, *Res Judicata* Could not Have Barred Them in the Subsequent Federal Action.**

The inconvenient truth ignored by Respondents is that Petitioners had no federal takings claims when they pursued their state actions, as the precedent summarized *supra*, Section A, makes clear. Accordingly, the court of appeals erroneously applied *res judicata* to bar Petitioners' subsequent Fifth Amendment claims.

The Restatement (Second) of Judgments is on point. It has been persuasive authority for this Court,[1] and was also cited by the court of appeals. App. 7a, 9a. Section 26 provides exceptions to the rule that claims cannot be "split" into two separate suits. One of those exceptions, where a subsequent claim is *not* extinguished, is:

> (c) The plaintiff was *unable to rely on a certain theory of the case* or to seek a certain remedy or form of relief in the first action *because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories* or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief ....

Restatement (Second) Judgments § 26(1)(c) (1982) (emphasis supplied). Commentary further explains that when "formal barriers [against litigating a claim] in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first." *Id.*, comment c.

The state-litigation rule must qualify as a "formal barrier" under the Restatement. *Williamson*'s ripeness requirement operated against Torromeo and MDR to preclude Fifth Amendment claims in the New Hampshire courts. Ripeness is considered jurisdictional in nature. See

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[1] See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001); *United States v. Mendoza*, 464 U.S. 154, 158 n. 3 (1984).

*Nat'l Park Hosp. Ass'n v. Dep't of Interior,* 538 U.S. 803, 807 (2003); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733 n.7 (1997). An unripe Fifth Amendment claim could not have been raised in the state proceeding because the state court would have lacked the power to decide it. Accordingly, *res judicata* could not have possibly barred a federal takings claim in the later federal action. A few citations in Petitioners' state papers to the Takings Clause and *First English*, regarding the underlying remedy of just compensation (Opp. 9-10), prove nothing. Petitioners could not have manufactured state jurisdiction over unripe federal takings claims no matter what they pleaded or argued. Subject matter jurisdiction cannot be created by allegations in pleadings, consent of parties, or rules of procedure. *E.g., Kontrick v. Ryan,* 540 U.S. 443, 453 (2004); *Wisc. Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998); *Whitmore v. Arkansas,* 495 U.S. 149, 155-56 (1990).

In short, for claim preclusion to apply in the later federal action, there must have been a claim to preclude in the prior state action. There was none here, so the court of appeals wrongly invoked claim preclusion. The fact that the court of appeals dismissed Petitioners' federal takings claims on *res judicata* grounds therefore does not mean that this case presents a state law question. Rather, it demonstrates how *Williamson*'s state-litigation rule, compounded by *San Remo*'s simultaneous claims rule, prevents Fifth Amendment claims from being adjudicated *anywhere*, in *any* court, and foments litigation about litigation. Only this Court can divine the correct interpretations of *Williamson* and *San Remo*, and offer guidance so property owners and the lower courts know whether, where and how Fifth Amendment claims can be brought.

### C. The Record Belies any Assertion That Petitioners Litigated Fifth Amendment Claims in State Court.

Sections A-B, *supra,* explain why it was legally impossible for Petitioners to have litigated federal takings claims in state court. In any event, as a factual matter, they did not.

In 2003, Torromeo and MDR petitioned this Court for a writ of *certiorari* following the New Hampshire Supreme Court's denial of compensation. At that time, the Town opposed on the ground that *Petitioners "waived" reliance on the Takings Clause by not asserting Fifth Amendment claims in the original state proceedings.* As the Town argued back in 2003:

> ... Petitioner's reliance on *Penn Central Transp. Co. v. City of New York,* U.S. 104 [sic], is misplaced. The Petitioners fail to cite the *Penn Central* case or its holding in its New Hampshire Supreme Court proceedings; *therefore, any argument based on that case has been waived and is not properly before this Court.*

App. 42a (emphasis supplied). Respondent cannot have it both ways. It should not be permitted to argue, as it finds expedient, that Torromeo and MDR "waived" federal takings cases in the state action, but now insist that Petitioners pressed their claims in state court—all to evade this Court's review.

In any event, Petitioners did not "actually litigate" Fifth Amendment claims in the state action. The undisputed record facts demonstrate that:

- The New Hampshire Supreme Court's opinion denying compensation for inverse condemnation contains not one word of federal law, and no discussion of whether the federal and state Constitutions provide equivalent property rights protections. App. 43a-49a. Indeed, the New Hampshire Supreme Court believed it is "not bound to adopt the federal interpretations," and its inverse condemnation decisions are based "on articulated adequate and independent *State* grounds." *State v. Ball,* 471 A.2d 347, 351 (N.H. 1983) (original emphasis).

- Respondent framed its appeal to the New Hampshire Supreme Court, based entirely on state law, with no reference whatsoever to a federal issue, law, or case. App. 50a-57a.
- The New Hampshire trial court awarded compensation, prior to being reversed. It relied on no federal law. App. 58a-68a.
- Petitioners' state complaints did not rely upon 42 U.S.C. § 1983, the vehicle by which aggrieved parties obtain a monetary remedy for federal constitutional violations committed by municipal actors. App. 75a-83a.

Yes, Petitioners cited the Takings Clause and *First English* in state court papers. Opp. 9-10. This was necessary to lay the foundational principle that the payment of compensation—not invalidation of the offending government action—is the "self-executing" remedy that the Fifth Amendment requires and establishes as a minimum national standard of constitutional protection. *First English,* 402 U.S. at 315-316. Respondent, however, would concoct a game of "Gotcha!," in which any mere reference to this Court's Fifth Amendment jurisprudence in state inverse condemnation litigation would result in claim preclusion. It effectively argues that a takings claimant's citation to a single federal case in state court means that a Fifth Amendment claim is being litigated, and is thereafter foreclosed from federal court. That is absurd.

And yes, Torromeo and MDR premised their 2003 petition for a writ of *certiorari* on arguments that the New Hampshire Supreme Court contravened and ignored this Court's Fifth Amendment case law. Opp. 10. Of course, this Court frequently reviews state supreme court opinions. See Sup. Ct. R. 10(c) (*certiorari* may be granted where "a state court of last resort has decided ... an important federal question in a way that conflicts relevant decisions of this Court"). Torromeo and MDR thus argued that the New Hampshire Supreme Court, interpreting state law, violated Fifth Amendment standards. Raising Fifth Amendment issues in the initial *certiorari* petition has no bearing on

whether Petitioners did, or even could have, pressed their Fifth Amendment claims in state court.

### D. Respondent's Issue Preclusion Argument is Smoke and Mirrors.

For the very first time in this federal action, Respondent decided to raise issue preclusion (or collateral estoppel) as a defense. Opp. 11. It is much too late. Issue preclusion is an affirmative defense. Fed. R. Civ. P. 8(c). As such, it is waived unless pleaded in an answer or raised in a pre-answer motion to dismiss. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971); *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996). Respondent waited far too long to mount any possible issue preclusion defense, so it is waived.

While issue preclusion is beyond the scope of this case and the Petition, an argument in the Opposition concerning that doctrine warrants clarification. Respondent asserts that *San Remo* "makes clear" that *res judicata* bars an attempt to relitigate a subsequent Fifth Amendment claim in federal court. Opp. 12. That is incorrect. The question decided by *San Remo* concerned *issue* preclusion, not *claim* preclusion. *San Remo*, 125 S.Ct. at 2504 ("The relevant question ... is whether the state court actually decided an issue of fact or law that was necessary to its judgment"); *id.* at 2505 ("[W]e are presently concerned only with issues actually decided by the state courts that are dispositive of federal claims raised under § 1983"). The Respondents in *San Remo* conceded that to apply claim preclusion in a later federal action would unfairly extinguish Fifth Amendment rights. Brief of Respondent at 26-28, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (No. 04-340).

Accordingly, the extant split in the circuits on the application of *claim* preclusion (see Pet. 15-17), which the court of appeals widened in the candidate decision for review, survives *San Remo* and should be resolved. In fact, since *San Remo*, one of the circuits has overcome claim

preclusion in the takings context, by allowing reservation of a Fifth Amendment cause of action for subsequent federal adjudication after *Williamson*-mandated state proceedings. *Bauknight v. Monroe County,* 446 F.3d 1327 (11th Cir. 2006).

### E. The Petition Places *Williamson*'s State-Litigation Rule Front and Center.

Petitioners and their supporting *amici* have amply documented the confusion in this Court's takings ripeness cases, the conflict in the lower courts on Fifth Amendment jurisdiction, and the exasperation of academics and practitioners against the state-litigation rule. We have highlighted the call from the *San Remo* concurrence, where four Justices recognized that *Williamson* must be revisited and its anomalies clarified.

One of Petitioners' *amici,* Franklin P. Kottschade, previously sought intervention from this Court on the takings jurisdictional question presented here. Mr. Kottschade filed his Section 1983 takings claim *directly* in federal court. The Eighth Circuit dismissed his case for failure to pursue initial state inverse condemnation litigation. This Court denied review. *Kottschade v. City of Rochester,* 319 F.3d 1038 (8th Cir.), *cert. denied,* 540 U.S. 825 (2003).

Now, in light of *San Remo*'s direction that state and federal takings claims may be brought simultaneously in state court, against *Williamson*'s backdrop that a federal takings claim is not ripe if initially brought in federal court, no takings claimant in his or her right mind will ever file a Fifth Amendment case initially in federal court. Aggrieved property owners will only file federal takings claims in state court. They may be removed to federal court by a municipal defendant à la *City of Chicago v. Int'l College of Surgeons,* 522 U.S. 156 (1997), only to be bounced back to state court à la *Koscielski v. City of Minneapolis,* 435 F.3d 898 (8th Cir. 2006). But even if a takings claimant is not ping-ponged between state and federal courts under such a

patently unfair removal scenario, and brings a federal court takings claim after state litigation, a circuit court of appeals will surely apply one of the preclusion doctrines—as the First Circuit did here—to bar subsequent federal review of the Fifth Amendment action.

As a practical matter, therefore, the only way this Court will be able to address *Williamson* and *San Remo* is in a case where a takings claimant (1) files in state court, (2) loses, (3) then files in federal court, and (4) is dismissed on issue preclusion, claim preclusion, or perhaps abstention. *That is this case.* Contrary to Respondent's assertion (Opp. 13), this kind of case is the only "vehicle" in which *Williamson* will ever, realistically, be reconsidered. The time is ripe, with this Petition, to revisit the state-litigation rule.

## II. THE STANDARD FOR DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS MUST BE CLARIFIED.

The Opposition proves Petitioners' point that the opinions of this Court and the lower courts conflict on the correct standard to apply when government action deprives property without due process. All of the cases it cites define the due process standard as "egregious and arbitrary conduct," or "used for the purposes of oppression," or "shocks the conscience." Opp. 14-15. It also recognizes that *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), uses a "substantially advances" formula. Opp. 17. Which is the standard? Do they mean the same thing? Only this Court can say for sure.

## CONCLUSION

For all of the foregoing reasons, and for the reasons presented in the Petition, the Court should address the state-litigation rule and decide the proper standard of liability for a deprivation of property without due process.

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